THE ROLE OF DISCRETION IN TERMINATIONS FOR DEFAULT

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THE ROLE OF DISCRETION IN TERMINATIONS FOR DEFAULT

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CHAPTER I

INTRODUCTION

The consequences of a termination for default in a government contract are severe. A default termination may cause a contractor to lose everything it has put into a contract, as well as future business. It may also jeopardize the contractor's ability to obtain future government contracts. A termination for default may serve as a basis for finding a contractor non-responsible or for downgrading its past performance rating. Additionally, it may impair the contractor's ability to get future bonding.[1]

In a fixed price type contract for supplies, if the Government terminates for default and does not take possession of the supplies, it does not have to compensate the contractor for any of its work and the contractor must return any progress payments it received to the Government.[2] The contractor remains liable for excess reprocurement costs. This is true even where the default is based on a minor breach such as insignificant delays in completing performance or small defects in the quality of performance.

Even in other types of contracts, where the contractor's forfeitures are less severe, termination for default may subject the contractor to excess reprocurement costs or other damages.[3]

Given these drastic consequences, the termination for default clauses do not make termination for default mandatory, but state that the Government "may, . . . by written notice of default to the Contractor, terminate this contract

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[1] Walsky Constr. Co., ASBCA No. 41541, Feb. 9, 1994, 94-2 BCA ¶ 26,698, at 132,785.

[2] FAR 52.249-8, Default (Fixed-Price Supply and Services) (APR 1984).

[3] Walsky Constr. Co., supra note 1, at 132,785.

in whole or in part."[4] This language gives the Government discretion in determining whether to terminate the contract for default. The Government

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[4] FAR 52.249-8, Default (Fixed-Price Supply and Service) (Apr 1984) states:

> (a)(1) The Government may, subject to paragraph (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
> (ii) Make progress, so as to endanger performance of this contract (but see paragraph (a)((2) below; or
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).
> (2) The Government's right to terminate this contract under subdivision (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer).

FAR 52.249-9, Default (Fixed-Price Research and Development) (Apr 1984) states:

> (a)(1) The Government may, subject to paragraphs (c) and (d) below, by written Notice of Default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—
> (i) Perform the work under the contract within the time specified in this contract or any extension;
> (ii) Prosecute the work so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

See also FAR 52.249-10, Default (Fixed-Price Construction) (Apr 1984) (stating, "the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable par of the work) that has been delayed"); FAR 52.249-6, Termination (Cost Reimbursement) (May 1986) (stating, "(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part, if—(2) The Contractor defaults in performing this contract and fails to cure the default within 10 days (unless extended by the Contracting Officer) after receiving a notice specifying the default. 'Default' includes failure to make progress in the work so as to endanger performance.").

may not abuse this discretion.[5] Courts and boards carefully scrutinize the contracting officer's discretion in termination for defaults because they view defaults as forfeitures that are to be strictly construed.[6]

The requirement for the Government to exercise discretion did not exist at common law. At common law, one party's material breach entitled the other to cancel the contract as a matter of course.[7] Discretion is a constraint necessitated by the Government's otherwise broad powers under the default clauses.

There are numerous situations in which the Government may choose not to terminate despite the contractor's default.[8] For instance, if the Government needs the supplies urgently and the defaulted contractor can provide them sooner than any other contractor, the Government may waive its right to terminate. FAR 49.402-4 recognizes that the contracting officer may select from the "following courses of action, among others," instead of terminating the contract for default:

> (a) Permit the contractor, the surety, or the guarantor, to continue performance of the contract under a revised delivery schedule.
> (b) Permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided the rights of the Government are adequately preserved.
> (c) If the requirement for the supplies and services in the contract no longer exists, and the contractor is not liable to the Government for damages as provided in 49.402-7, execute a

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[5] Schlesinger v. United States, 390 F.2d 702, 708 (Ct. Cl. 1978).

[6] Walsky Constr. Co., supra note 1.

[7] Cf. U.C.C. § 2-106(4).

[8] See Schlesinger, 390 F.2d at 708.

> no-cost termination settlement agreement using the formats in 49.603-6 and 49.603-7 as a guide.

Contracting Officers frequently waiver minor nonconformances in performance or schedule for consideration. Additionally, the contracting officer may decide the terminate for convenience, rather than for default.[9]

While termination is not mandatory, the exercise of discretion is. The existence of mandatory discretion means that the Government may not exercise the discretion in an arbitrary or capricious manner. If the contracting officer fails to exercise discretion, a board of contract appeals or a court may overturn the default termination and convert it to a termination for the convenience of the Government.

Before the Government may terminate a contractor for default, it must independently weigh a variety of often conflicting facts. FAR 49.402-3(f) [10]

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[9] McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358, 371-72 (1996).

[10] Five of these seven factors were formerly contained in Armed Services Procurement Regulation (ASPR) 18-618.4(a) (codified at 32 C.F.R. § 18-618.4(a) (1982)). ASPR 18-618.4(a) states:

> (a) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:
> (a)(i) the provisions of the contract and applicable laws and regulations;
> (a)(ii) the specific failure of the contractor and excuses, if any, made by the contractor for such failure;
> (a)(iii) the period of time which would be required for the Government or another contractor to complete the work as compared to the time required for completion by the delinquent contractor;
> (a)(iv) the effect of termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments; and
> (a)(v) any other pertinent facts and circumstances.

In K&M Constr., ENGBCA No. 2998, Mar. 7, 1972, 72-1 BCA ¶ 9366, at 43,474, the Board explained that "[t]he main purpose of [ASPR 18-618.4(a)'s] five subparagraphs, as the title indicates, is to set out procedures [to] be

requires the contracting officer to consider the following factors in determining whether to terminate a contract for default:

> (1) The terms of the contract and applicable laws and regulations.
> (2) The specific failure of the contractor and the excuses for the failure.
> (3) The availability of the supplies or services from other sources.
> (4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
> (5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.
> (6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.
> (7) Any other pertinent facts and circumstances.

The contracting officer must consider these factors in light of the totality of the circumstances surrounding the particular case; a pro forma check off is not

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followed in cases where it is determined that a default termination is 'in the best interest of the Government.'" It further stated:

> "[t]he first two factors listed alert the contracting officer to the consequences of disregarding a contractor's rights under contract provisions and regulations, including . . . failure to allow for excusable causes of delay . . . . The next two factors, obviously written for the Government's benefit, do not require the contracting officer to allow performance to continue or to terminate for the convenience of the Government if the implied situations exist . . . .

Id. at 43,474-75. The Board held that this clause did not confer any rights on the contractor it did not have without the regulation. Id.

See Chapter IV.B.3, infra, for further discussion on the FAR 49.402-3(f) factors.

sufficient.[11] While failure to consider any one of these factors does not automatically mean the contracting officer failed to exercise discretion, a court or board may use this failure in determining whether the contracting officer abused his or her discretion.

This thesis explores the nature and limitations on the Government's exercise of its discretion.

[11] Walsky Constr. Co., ASBCA No. 41541, Feb. 9, 1994, 94-2 BCA ¶ 26,698, at 132,786; Jamco Constructors, Inc., VABCA Nos. 3271, 3516T, Oct. 5, 1993, 94-1 BCA ¶ 26,405, at 131,361.

CHAPTER II

WHO MUST EXERCISE DISCRETION?

The issue of which individual exercised discretion is central to a court's or board's ability to evaluate the discretion. If only the contracting officer can exercise discretion, and his or her decision lacks any discretion, arguably, no one else in the Government could make the decision. In such a case, the court's inquiry would end. In other areas of discretion, courts have declined to substitute their judgment for that of the decision-maker.[12] If, however, other individuals may also exercise the discretion, then the court or board finding that the contracting officer abdicated his or her discretion should inquire into whether the individual actually deciding to terminate had authority to exercise discretion and exercised it properly.

A. FAR Guidance

The default clauses and FAR 49.402-3(a) reference the "Government" as the entity that may consider whether to default.[13] While the clauses reference the contracting officer's actions in carrying out the termination, they consistently uses the broad term "Government" in discussing who may terminate. For example, FAR 52.249-8(b) states, "[i]f the Government terminates this contract . . . it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or

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[12] General Elec. Co. v. United States, 412 F.2d 1215, 1222 (1969).

[13] The default clauses state, "The Government may . . . terminate this contract." FAR 52.249-8(a)(1) Default (Fixed-Price Supply and Service); FAR 52.249-10(a) Default (Fixed-Price Construction); FAR 52.249-9(a)(1), Default (Fixed-Price Research and Development). FAR 49.402-3(a) states, "[w]hen a default termination is being considered, the Government shall decide which type of termination action to take."

services . . . ." This language contemplates that the Government and the contracting officer may not be the same person.

In the Cost-Reimbursement termination clause, FAR 52.249-6, the clause begins like the other default clauses by stating, "[t]he Government may terminate." Subsection (b), however, contemplates that the Contracting Officer will actually terminate. It states, "[t]he Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination . . . ." This language suggests that although another Government person may exercise the discretion to terminate, only the Contracting Officer may actually issue the modification terminating the contract for default.

Other regulations addressing termination for default contemplate that the contracting officer will exercise the required discretion.[14] FAR 49.402-3(f) requires "the contracting officer (emphasis added)" to consider seven factors "in determining whether to terminate a contract for default." FAR 43.103(b)(4) expects that only the contracting officer will sign the termination notice, which he or she issues as a unilateral modification. FAR 49.101(a) provides, "[t]he termination clauses . . . authorize contracting officers to terminate contracts . . . for default (emphasis added)." Subsection (b) states, "[t]he contracting officer shall terminate contracts, whether for default or convenience, only when it is in the Government's interest (emphasis added)."

Therefore, the regulatory language is sufficiently broad in some sections to support the conclusion that an individual other than the contracting officer may exercise discretion and narrow enough in other areas to support arguments that only the contracting officer should exercise discretion.

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[14] See FAR 43.103(b)(4); 49.101(b); 49.402-3(f).

B. Case Law

The case law has left the issue open, although Schlesinger v. United States[15] and McDonnell Douglas Corp. v. United States[16] strongly suggest that someone other than the contracting officer could exercise discretion. In Schlesinger the Court noted, "[w]e do not put our decision on the failure of the contracting officer to exercise his own judgment. This agreement gave the default-termination power to 'the Government' and did not single out the contracting officer as the official to decide that particular question."[17] The Court in McDonnell Douglas agreed that others in the chain of command, such as the Secretary of Defense, could "perhaps . . . have terminated the contract," although it did not ultimately reach the issue.[18] The Court stated, "[t]he Schlesinger court did not base its decision on the contracting officer's failure to exercise his own judgment. Neither do we. The power to terminate may rest with 'the Government,' but no one in the Government exercised discretion in terminating this contract for default."[19]

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[15] 390 F.2d 702 (Ct. Cl. 1968).

[16] 35 Fed. Cl. 358 (1996).

[17] Schlesinger, 390 F.2d at 709.

[18] McDonnell Douglas, 35 Fed. Cl. at 372.

[19] Id.

C. Inherent Contracting Authority of Agency Heads and Heads of Contracting Activities

An evaluation of cases discussing authority suggests that an individual other than the contracting officer may exercise the requisite discretion, providing that he has contracting authority. Only individuals with authority, actual or implied, may bind the Government.[20]

Certain government officials such as agency secretaries and heads of contracting activities have inherent contracting authority by virtue of their position. FAR 1.601 states:

> [A]uthority and responsibility to contract for authorized supplies and services are vested in the agency head. The agency head may establish contracting activities and delegate broad authority to manage the agency's contracting functions to heads of such contracting activities. Contracts may be entered into and signed on behalf of the Government only by contracting officers. In some agencies, a relatively small number of high level officials are designated contracting officers solely by virtue of their positions.

While secretaries and heads of contracting activities may delegate this authority to designated contracting officers who are appointed in accordance with FAR 1.603-1, the designated contracting officers remain subject to the agency head's ultimate authority.[21] Therefore, individuals with inherent

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[20] Wilber Nat'l Bank v. United States, 294 U.S. 120, 124 (1935); International Business Investments, Inc. v. United States, 17 Cl. Ct. 122 (1989); AAA Eng'g & Drafting, Inc., ASBCA No. 44605, Feb. 8, 1996, 96-1 BCA ¶ 28,182, at 140,681.

[21] See TDC Management Corp., DOTCAB No. 1802, Mar. 5, 1991, 91-2 BCA ¶ 23,815, at 119,318 (holding that "a direction from the Administrator has the same effect as a directive from a lesser official who has been designated as a 'Contracting Officer' by, and receives his/her authority by delegation from, the Administrator"); Flag Real Estate, Inc., HUDBCA No. 84-899-C14, June 6, 1988, 88-3 BCA ¶ 20,866, at 105,519 (finding that the HUD Regional Office

contracting authority retain their authority to control contracting matters that they have delegated.

For example, in McDonnell Douglas, the plaintiffs alleged that the Secretary of the Department of Defense, rather than the contracting officer, had decided to terminate the contract for default. Both statutes and case law provide the Secretary of Defense with great control over functions, including contracts, even after he delegates the functions. The Secretary of Defense has "authority, direction, and control over the Department of Defense."[22] This includes his statutory authority as an agency head to delegate "[p]rocurements for or with other agencies" and "[a]pproval of terminations and reductions of joint acquisition programs."[23] The Secretary of the Navy could similarly delegate the power to terminate a contract to the contracting officer.[24] A Navy contracting officer, however, carries out his or her delegation subject to the Secretary of Defense's ultimate "authority, direction, and control."[25]

Chief Property Officer who supervised the contracting officer had contracting officer authority); Village Properties, HUDBCA No. 85-962-C6, Mar. 17, 1987, 87-2 BCA ¶ 19,704, at 99,767 (finding that the Director of Housing and Management, the Chief Property disposition Officer, and the Acting Chief of Contracting, by virtue of their office, "possessed contracting officer authority by delegation of authority from the Secretary" and had the power to bind the Government); JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOV'T CONTRACTS 33 (3d ed. 1995).

[22] 10 U.S.C.A. § 113(b) (West Supp. 1996).

[23] 10 U.S.C.A. § 1311(a)-(c) (West Supp. 1996).

[24] 10 U.S.C.A. § 5013 (West. Supp. 1996).

[25] McDonnell Douglas Corp. v. United States, No. 91-1204C, Defendant's Motion for Judgment Upon Count XVII, 4-8.

In United States v. Adams the Supreme Court recognized the Secretary's power to contract and exercise control over procurements he had delegated to others:

> There has been a good deal of discussion between the learned counsel upon the questions, whether or not General Fremont possessed competent power, as commander of the military department, to make a valid contract with the petitioner for the construction of the boards. . . . For the purposes of the decision, we may admit the competency of the power. . . . And whether [the Secretary] makes the contracts himself, or confers the authority upon others, it is his duty to see that they are properly and faithfully executed; and if he becomes satisfied that contracts which he has made himself are being . . . unfaithfully executed, it is his duty to interpose, arrest the execution, and adopt effectual measures to protect the government against the dishonesty of subordinates.[26]

Individuals other than secretaries of agencies and heads of contracting authorities may also possess contract authority, especially when they are at the secretariat level. In Lockheed Shipbuilding & Construction Corp.[27] the Deputy Secretary of Defense, Secretary Packard, had entered into a tentative settlement agreement on ship claims for $62,000,000, subject to approval by the Navy's Contract Claims Control and Surveillance Group (CCCSG). The final decision authority refused to approve this settlement. The Armed Services Board of Contract Appeals found that this tentative agreement was not binding as a contract because the condition precedent—approval—had

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[26] 174 U.S. 463, 477 (1878).

[27] ASBCA No. 18460, May 13, 1975, 75-1 BCA ¶ 11,246, aff'd on reconsideration, ASBCA No. 18460, Oct. 24, 1975, 75-2 BCA ¶ 11,566.

not occurred. However, it also found that the Secretary Packard had "impliedly promised that the Navy would approve the ship claims settlement for $62,000,000 and intended that Lockheed, its bankers and airline customers, and the Emergency Loan Guarantee Board should act in reliance on this assumption and implied promise."[28] The Board held that the Deputy Secretary of Defense had authority to settle and to waive a procedural Navy regulation requiring higher authorities to approve the settlement agreement. The Board concluded that "Secretary Packard and members of the Navy secretariat had the authority to waive the regulation, or, by their representations or conduct, provide a basis for estopping the Government from denying the legal enforceability of the settlement solely because of the application of the regulation."[29] It held that the contractor's "reliance was reasonable because Secretary Packard held the second highest office in the entire department, and had plenary authority over all of the DOD programs."[30] Therefore, the Board estopped the Government from denying the enforceability of the settlement.

In it's request for reconsideration, Lockheed Shipbuilding and Construction Co. (Lockheed II),[31] the Government argued that the Secretary of Defense had no contracting authority. It also argued that in assessing the

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[28] Id. at 53,549.

[29] Id. at 53,553.

[30] Id. at 53,558.

[31] ASBCA No. 18460, Oct. 24, 1975, 75-2 BCA ¶ 11,566.

whether the Deputy Secretary could waive the regulation giving final approval to the Navy's CCCSG, the Court should consider the special administrative competence of the CCCSG. The Court held:

> [W]e do not think that the Navy can shield a procurement matter from the supreme authority of the deputy Secretary of Defense simply by entrusting it to a committee of procurement experts. . . . We also conclude that by virtue of his office Secretary Packard was clothed with authority to enter into contracts or to settle contract claims.[32]

A person with inherent contracting authority retains authority and control over subordinates to whom he or she has delegated contracting functions.[33] In Congress Construction Corp. v. United States[34] the Court of Claims recognized the right of a supervisor, the Assistant Secretary of Defense, to disapprove a land transaction, even though a subordinate had entered into a contract that arguably promised that the Navy would make a good faith attempt to persuade congressional committees to approve appropriation money. The Court stated:

> [W]hen purely executive functions of a discretionary nature are imposed on a subordinate official of the Government it is an implied condition that his actions (before they have become final) are subject to the review and supervision of his

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[32] Id. at 55,217.

[33] Cf. Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 (finding that "[i]nherent in [the Under Secretary of Energy's] authority to appoint source selection officials is the power to review source selection decisions, reverse or vacate those decisions, make new source selection decisions, and cancel and re-delegate the authority to act as a source selection official").

[34] 314 F.2d 527 (Ct. Cl. 1963).

> superiors—if the superior is authorized to intervene in that particular field and does so in time. [Citation omitted.] So far as the Presidency is concerned, this is a necessary corollary of Myers v. United States, 272 U.S. 52, 163-164 (1926) [parallel citations omitted], holding that Article II of the Constitution "grants to the President the executive power of the Government . . . including the power of appointment and removal of executive officers . . . . We think that in the circumstances of this case the Secretary of Defense had like authority.[35]

The Court concluded, "[i]n sum, the Department of Defense was endowed with undeniable supervisory control, general and specific, over the proposed purchase of land from plaintiff."[36]

Because a superior official who is a Secretary or a head of a contracting activity already possesses contract authority, it will be difficult for a contractor to successfully argue that such an individual does not have authority to exercise discretion in deciding to terminate the contract. The term "Government" in the default clauses is broad enough to include these individuals who are themselves a type of contracting officer.

D. Individuals Without Inherent or Designated Contracting Authority

A tougher issue is whether a supervisor without inherent contracting authority may exercise the requisite discretion, when he or she could not obligate the Government.

Not all supervisors possess contracting authority.[37] In Inter-Tribal Council of Nevada, Inc. the Board found that an Assistant Area Director for

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[35] Id. at 530-31.

[36] Id. at 531-32.

Education who was the "'boss' for Area education matters" and was named as the "contact person" for negotiations on an upcoming contract did not have actual authority, even where the contracting officer had sought his prior approval for a contract budget modification.[38]

The court's holding in Timberland Paving & Construction Co. v. United States[39] suggests that an individual who does not have contracting authority cannot exercise the requisite discretion. In that case, the original contracting officer on a Portland road construction contract, Mr. Powers, transferred from Portland, Oregon, to Washington, D.C. and no longer had authority over the Portland contract. On April 21, 1980, his supervisor at the Portland office requested that he again be designated as contracting officer for the Portland contract, despite the fact that he had moved. Before Mr. Powers received this designation, he terminated the plaintiff's contract on April 23, 1980. On April 25, 1980, the Acting Deputy Commissioner in Washington, D.C. concurred with the re-designation of Mr. Powers as contracting officer. The Claims Court found Mr. Powers did not have authority to terminate for default at the time he terminated. The Court denied the Government's request for a retroactive delegation of authority or a ratification. The Court held that:

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[37] See Housing Corp. of America v. United States., 468 F.2d 922, 925 (Ct. Cl. 1972) (finding that neither the director of production or the chief of the construction branch office of the Department of Housing and urban Development "was a contracting officer nor authorized to commit defendant to any financial obligations of a contractual nature directly with private parties").

[38] IBCA No. 1234-12-78, Apr. 14, 1983, 83-1 BCA ¶ 16,433, at 81,745.

[39] 8 Cl. Ct. 653 (1985).

> [The Default clause] required that, on request, and prior to any termination of the contract for default, the contracting officer "shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension." . . . As a result [of his lack of authority], the duties and obligations made by [the Default] clause a prerequisite to a termination for default thereunder simply were not met. . . . [T]he purported April 23, 1980 termination of plaintiff's contract for default was invalid and of no force and effect.[40]

The Court concluded that Government must convert the default termination to one for convenience. The Court's refusal to allow an individual without contracting authority over the Portland contract to exercise discretion, or to allow the Government to ratify that termination suggests that only an individual with contracting authority can exercise the necessary discretion in determining whether to terminate for default.

It is difficult to imagine how an individual who could not obligate the Government could exercise the requisite discretion under the termination clause and order the contracting officer to terminate. Allowing a supervisor without contracting authority to direct a contracting officer to terminate for default vitiates the purpose in limiting contracting authority to those individuals who, because of their experience, education, training, judgment, and character[41] have been designated contracting officers. Therefore, a court or board should not find that an individual without contracting authority

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[40] Id. at 659.

[41] See FAR 1.603-2 (detailing examples of criteria for selecting contracting officers, including "experience," "education or special training," and "knowledge").

has the authority to render the requisite discretion necessary to terminate the contract for default.

E. Generally, the Contracting Officer Is the Individual Who Exercises Discretion

Even assuming that an official other than the contracting officer may possess authority to terminate, practical considerations often prevent such individuals from exercising this authority or the Government from holding them out as the decision makers. In refuting a contractor's allegations of abuse of discretion, the Government must identify an individual who exercised discretion. It would be highly unusual for that person to be anyone other than the designated contracting officer. The contracting officer signing the termination notice is responsible on paper for the termination. Higher ranking officials may not know the details as well as the contracting officer and may have different concerns.[42] Once the Government identifies the contracting officer as the person who exercised discretion, its efforts to convince a court that another person actually exercised discretion are unlikely to be credible. Additionally, the Government counsel may wish to distance the involvement of a higher ranking authority for fear that a court or board will interpret the involvement as proving that the contracting officer abdicated his or her discretion to his or her supervisor. For these reasons, if a court finds

[42] See McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358, 372 (1996).

that the contracting officer abused his or her discretion, it is unlikely that someone higher in the chain of command who possessed contracting authority was exercising the requisite discretion. If they were, they would have likely communicated their concerns to the contracting officer. Not one case holding that a contracting officer failed to exercise discretion has found that a higher ranking official exercised the requisite level of discretion.

McDonnell Douglas illustrates the limitations of relying on anyone other than the contracting officer as the person exercising discretion. In McDonnell Douglas the Court noted that "Government counsel attempted to distance the Secretary of Defense and his office from the decision to terminate the contract." The Court concluded, "[n]either the Secretary of Defense nor anyone else in DOD exercised discretion in the process."

Although theoretically a person other than the contracting officer may exercise the requisite discretion, in practice, it is the contracting officer's responsibility.

CHAPTER III

BASIS OF DISCRETION

A. The Default Clause Provides for Discretion

The language in the default clause provides the Government with discretion to terminate. It states that the Government "may" terminate. However, prior to 1967, the boards of contract appeals examined only whether the Government had a right to terminate for default and exercised that right properly.[43] The boards looked narrowly at two issues: (1) whether the contractor was in default; or, (2) if the contractor was in default, whether the default arose out of "causes beyond the control and without the fault or negligence" of the contractor.[44] The boards of contract appeals refused to review the contracting officer's administrative decision to exercise the right to terminate.[45]

In Schlesinger v. United States[46] the United States Court of Claims considered whether the Navy abused its discretion in terminating for default. The Court found that the source of this discretion was the language of the clause itself. "The clause says that 'the Government may . . . terminate,' not

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[43] See, e.g., Woodside Screw Machine Co., ASBCA No. 6936, Feb. 27, 1962, 1962 BCA 3308; Delmar Mills, Inc., ASBCA No. 6138, Jan. 23, 1961, 61-1 BCA ¶ 2910, at 15,195; El-Tronics, Inc., ASBCA Nos. 5501, 5511, 5512, Aug. 18, 1960, 60-2 BCA ¶ 2712, at 13,729.

[44] Id.

[45] See, e.g., Royal Lumber Co., Inc., ASBCA No. 2847, Dec. 20, 1955, 1955 WL 9052 (no BCA citation).

[46] 390 F.2d 702 (Ct. Cl. 1968).

'shall' or 'must.'"[47] As discussed in further detail in Chapter IV.B.5,[48] the Court ultimately held that the Navy had abused its discretion. It held, "[s]uch abdication of responsibility we have always refused to sanction where there is administrative discretion under a contract. [Citations omitted] This protective rule should have special application for a default-termination which has the drastic consequence of leaving the contractor without any further compensation."[49]

Schlesinger also based its decision on prior case law holding that where a contract provides that the contracting officer would decide disputes, "a decision by someone else is a nullity."[50] One of those cases, John A. Johnson, held that where the contract required the contracting officer's decision on a question of fact, he must exercise judgment in carrying out his contractual responsibility. He could not abdicate that judgment to a superior.[51] Similarly, Schlesinger interpreted the termination for default clause to mandate discretion. Therefore, a decision to terminate which was not the product of discretion was a nullity.

The Schlesinger court also recognized that the discretion involved was not unlike that required for termination for convenience. Because the Schlesinger court, in part, based its inherent authority to consider the

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[47] Id. at 707.

[48] See page 57 of this thesis, infra.

[49] Schlesinger, 390 F.2d at 709.

[50] New York Shipbuilding Corp. v. United States, 385 F.2d 427, 436 (Ct. Cl. 1967).

[51] John A. Johnson Contracting Corp. v. United States, 132 F. Supp. 698, 706 (Ct. Cl. 1955).

Government's discretion on the fact that use of discretion is also mandatory and reviewable in a termination for convenience, it is worthwhile to look briefly at the discretion the Government is required to exercise in a termination for convenience.

B. Comparison of Required Discretion with that in a Termination for Convenience

The Termination for Convenience clause allows the Government to terminate a contract without cause and limits the contractor's recovery to the contract price for completed work, costs incurred plus profit on terminated work,[52] and costs of preparing the termination settlement proposal.[53] These damages differ from those at common law because they do not include anticipatory profits for unperformed work[54] or other consequential damages.[55] FAR 52.249-2 states, "[t]he Government may terminate performance of work

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[52] In a fixed-price contract, the Government will not pay the contractor profit on completed work "if it appears the contractor would have sustained a loss on the entire contract had it been completed." FAR 52.249-2, Termination for Convenience of the Government (Fixed-Price) (Apr 1984).

[53] Id.; see FAR 52.249-6, Termination (Cost Reimbursement) (May 1986).

[54] Dairy Sales Corp. v. United States, 593 F.2d 1002, 1005 (Ct. Cl. 1979); Mega Constr. Co., 29 Fed. Cl. 396, 475 (1993); George Marr Co., GPOBCA No. 31-94, Apr. 23, 1996, 1996 WL 273,662; New South Press & Assoc., GPOBCA No. 14-92, Jan. 31, 1996, 1996 WL 112,555.

[55] Spectrum Leasing Corp. v. General Servs. Admin., GSBCA No. 12189, Nov. 8, 1994, 95-1 BCA ¶ 27,317, at 136,179; Cox & Palmer, ASBCA No. 37328, Aug. 14, 1989, 89-3 BCA ¶ 22,197, at 111,665-66; Aerdco, Inc., GSBCA No. 3776, Sep. 22, 1977, 77-2 BCA ¶ 12,775, at 62,083, recons. denied, Dec. 5, 1977, 78-1 BCA ¶ 12,926; H & J Constr. Co., ASBCA No. 18,521, Mar. 21, 1975, 75-1 BCA ¶ 11,171, at 53,207, recons. denied, Apr. 26, 1976, 76-1 BCA ¶ 11,903.

under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest." Other than the requirement that the termination be in the Government's best interest, the clause does not contain any meaningful limitations. A contract which allows one party to escape its contract obligations without limit or obligation renders the consideration illusory.[56] Therefore, courts and boards have fashioned limits on the Government's right to terminate for convenience. Several of those limitations are similar to ones used to limit the Government's right to terminate for default.

Courts and boards have traditionally recognized that if the Government terminates in bad faith, it is liable for breach damages. However, as discussed further in Chapter III.B.1, courts presume that the Government acts in good faith.[57] To overcome this presumption, a contractor must prove that the Government had a specific intent to injure it.[58] Because this is a difficult standard, few cases ever meet it.[59]

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[56] Torncello v. United States, 681 F.2d 756, 760 (Ct. Cl. 1982) ("[I]t is hornbook law . . . that a route of complete escape vitiates any other consideration furnished and is incompatible with the existence of a contract"); see 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 4:24, at 559, 562-63 (4th ed. 1990) (stating "if one party to an agreement reserves an unqualified right to cancel the bargain, no legal rights can arise from it while it remains executory. However, if the party may only cancel. . . upon the giving of reasonable notice . . the promise is nevertheless enforceable.").

[57] Kalvar Corp. v. United States, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), cert. denied, 434 U.S. 830 (1977).

[58] Id.

[59] See, e.g., A-Transport Northwest Co. v. United States, 36 F.3d 1576 (Fed. Cir. 1994) (upholding summary judgment for Government because evidence of Government's inconsistency was insufficient to allow trier of fact to find in contractor's favor on bad faith issue); Stephen Zucker, Packages Servs. Plus, PSBCA No. 3396, Apr. 15, 1996, 96-2 BCA ¶ 28,282 (holding that the contractor failed to show bad faith, even though the Government conceded

Courts and boards also refuse to enforce a termination for convenience where the contracting officer's termination was arbitrary and capricious or represented a clear abuse of discretion.[60] A termination without a rational basis will meet this test.[61] Contractors have had a very difficult time establishing this standard in termination for convenience cases.[62]

In Torncello v. United States the Court of Claims held that for the Government to terminate in accordance with the termination for convenience clause, it must show "some kind of change from the circumstances of the bargain or in the expectations of the parties" between the time of contract award and the time of termination.[63]

Because both the bad faith and abuse of discretion standards are difficult to meet, Torncello rejected them as effective limits which constitute adequate consideration. In Torncello the Court of Claims stated, "the government's obligation to act in good faith hardly functions as the meaningful obligation that it may be for private persons."[64] Courts and

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that Postal Service personnel made mistakes, including an unauthorized closure of contract postal units that the contractor operated); Melvin R. Kessler, PSBCA Nos. 2820, 2972, Feb. 24, 1992, 92-2 BCA ¶ 24,857 (finding no bad faith where contracting officer terminated for convenience because he and the contractor could not agree on a bilateral schedule change).

[60] See Stephen Zucker, supra note 59, at 141,203 (stating that a showing that the contracting officer's decision to terminate was arbitrary and capricious is "a necessary prerequisite to finding of abuse of discretion").

[61] Vibra-Tech Eng'rs, Inc. v. United States, 567 F. Supp. 484, 486 (D. Col. 1983).

[62] See TLT Constr. Corp., ASBCA No. 40501, Apr. 2, 1993, 93-3 BCA ¶ 25,978.

[63] 681 F.2d 756, 772 (Ct. Cl. 1982).

[64] Id. at 771.

boards, however, continue to recognize bad faith or abuse of discretion standards as effective limits on discretion.[65]

Recent cases have applied Torncello narrowly and have focused on the bad faith and abuse of discretion tests.[66] In Salsbury v. United States the Federal Circuit characterized Torncello as merely standing for "the unremarkable proposition that when the government contracts with a party knowing well that it will not honor the contract, it cannot avoid a breach claim by adverting to the termination for convenience clause."[67] It signaled a return to the bad faith and abuse of discretion standard when it stated, "it is not the province of the [board] to decide de novo whether termination was the best course. 'In the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive.'"[68]

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[65] See, e.g., Automated Servs., Inc. DOT BCA 1753, Nov. 25, 1986, 87-1 BCA ¶ 19,459, at 98,353 ("[T]his reluctance to apply Torncello broadly has been particularly true with respect to the principle appellant urges upon us, i.e., that Torncello abandoned forever the standard of bad faith and abuse of discretion as a basis for invoking the convenience termination clause. In fact, the Claims Court and Boards have continued to apply that standard."); see also John Robert Hart, The Government's Right to Terminate for Its Own Convenience 103 (1990) (unpublished LL.M. thesis, The George Washington University Law School).

[66] See, e.g., Linan-Faye Constr. Co. v. Housing Authority of the City of Camden, 49 F.3d 915, 925 (3d Cir. 1995) (noting that "subsequent cases have limited the scope of Torncello); Modern Sys. Technology Corp. v. United States, 24 Cl. Ct. 699, 704, n. 5 (1992) (applying the bad faith and abuse of discretion tests); New South Press & Assoc., Inc., GPOBCA No. 14-92, Jan. 31, 1996, 1996 WL 112555, n. 51 ("[S]ubsequent decisions clearly show that the Torncello holding has been restricted in its application [citations omitted]."); Plaza 70 Interiors, Ltd., HUDBCA No. 94-C-150-C9, May 2, 1995, 95-2 BCA ¶ 27,668, at 137,938 ("[T]he Torncello holding has been restricted in its application.").

[67] 905 F.2d 1519, 1521 (Fed. Cir. 1990), cert. denied, 498 U.S. 1024 (1991).

[68] Id. (citing John Reiner & Co. v. United States, 325 F.2d 438, 442 (1963)).

In a termination for default, the limits on the Government's rights are inherently more restricted than in a termination for convenience because the Government may only exercise the clause if the contract is in default. Although this limit should negate any issues regarding adequate consideration, McDonnell Douglas Corp. v. United States[69] indicates that to allow a contracting officer to terminate without exercising discretion would render the contract illusory. In rejecting the Government's suggestion that the Secretary of Defense's role in terminating did not nullify the default termination, the Court stated, "[i]n effect, defendant argues that the Secretary's authority overrides all contractual obligations of the United States. This argument suggests that most government contracts are illusory."[70] This language suggests that the limits placed on the Government's right to terminate for default, such as the requirement for the Government to act in good faith and exercise discretion, developed to protect the bargain. For example, if courts allowed the Government to terminate in bad faith for the slightest breach without incurring any obligation to pay for completed work, the contract would be illusory.

The limits courts and boards place on the Government's right to terminate for default are stricter than in a termination for convenience because courts and boards view a termination for default as a forfeiture.[71] Consequently, contractors have been more successful in proving that the Government abused its discretion in the termination for default context than

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[69] 35 Fed. Cl. 358 (1996).

[70] Id. at 372.

[71] Cf. Walsky Constr. Co., ASBCA No. 41541, Feb. 9, 1994, 94-2 BCA ¶ 26,698.

in the termination for convenience context. Because of the inherent limits within the Termination for Default clause itself and because courts and boards have strictly construed the requirement for the contracting officer to exercise discretion, no case has added additional restrictions, such as a requirement for changed circumstances. The next chapters explores the limits on the Government's right to termination for default in more detail.

CHAPTER IV

ABUSE OF DISCRETION

For a board or a court to set aside a contracting officer's decision to terminate for default, the contractor must prove that the decision was "arbitrary or capricious, or that it represents an abuse of discretion."[72]

A. Burden of Proof

In a default termination, the Government has the burden of proving that it acted correctly in terminating the contract for default.[73] Once the Government proves the contractor was in technical default and it had a right to terminate, the burden shifts to the contractor to show that the Government abused its discretion.[74] The Boards of Contract Appeals will presume that Government officials "acted properly in their official capacities" and "will not substitute their judgment or discretion for that of the contracting officer."[75] For a contractor to prove abuse of discretion and overcome this presumption, it must show by a preponderance of evidence that the Government abused its

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[72] Quality Env't Sys., Inc., ASBCA No. 22178, Jul. 22, 1987, 87-3 BCA ¶ 20,060, at 101,569.

[73] Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987); AIW-Alton, Inc., ASBCA No. 45032, Mar. 14, 1996, 96-1 BCA ¶ 28,232, at 140,977.

[74] Univex Int'l, GPOBCA No. 23-90, Jul. 31, 1995, 1995 WL 488,438.

[75] Jamco Constructors, Inc., VABCA Nos. 3271, 3516T, Oct. 5, 1993, 94-1 BCA ¶ 26,405, at 131,361 (quoting Executive Elevator Serv., Inc., VABCA No. 2152R, 87-3 BCA ¶ 20,083); see Fanning, Phillips & Molnar, VABCA No. 3856, Feb. 22, 1996, 96-1 BCA ¶ 28,214, at 140,834.

discretion in terminating for default.[76] This standard is easier to meet than other circumstances where a contractor seeks to show that the Government abused its discretion and must overcome a "considerable" or "very high" burden of proof.[77]

Even if a Board would not have reached the same decision as the contracting officer, it will not disturb the decision "if it is the product of genuine consideration of the relevant information at hand."[78]

The Government cannot show that its default was proper merely because it can establish that the contractor was in technical default.[79] Although courts and boards of contract appeals often hear evidence of default in determining whether the Government abused its discretion, they need not always consider the technical grounds supporting default prior to deciding whether the Government properly exercised its discretion.[80]

Courts and boards are more likely to refuse to hear evidence of the contractor's default where the contracting officer had a bad motive or abdicated his or her discretion. In such cases, an extraneous factor not related to the contractor's actual default motivates the contracting officer to

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[76] Walsky Constr. Co., ASBCA No. 41541, Feb. 9, 1994, 94-2 BCA ¶ 26,698, at 132,786 (citing Quality Env't Sys, Inc., ASBCA No. 22178, 87-3 BCA ¶ 20,060).

[77] Id. (citing United States Fidelity & Guaranty Co., 676 F.2d 622 (Ct. Cl. 1982)).

[78] Jamco Constructors, Inc., VABCA Nos. 3271, 3516T, Oct. 5, 1993, 94-1 BCA ¶ 26,405, at 131,361.

[79] Monaco Enters. v. United States, 907 F.2d 159, 1990 WL 82,670 (Fed. Cir. 1990); Walsky Constr. Co., supra note 76.

[80] Walsky, supra note 76, at 132,784.

terminate the contractor for default. Arguably, the contractor's status of default is irrelevant in such cases, because the contracting officer would not have exercised discretion regardless of the degree of default.

In Walsky the Government argued that the Board had erred by not finding a technical ground to support default before it reached the issue as to whether the Government exercised proper discretion.[81] On reconsideration, the Board rejected this argument, recognizing that "a finding of technical default is not determinative on the issue of the propriety of a default termination."[82] The Board concluded that even "[a]ssuming, arguendo, that a different technical ground for default, not relied upon by the contracting officer, was established, it would not affect the outcome of the case."[83]

In McDonnell Douglas the Court refused to review the entire record of contract performance so that the Government could prove that the contractor was in technical default.[84] Given the evidence of the contracting officer's abdication of his discretion, the Court found it did not need to hear evidence of the contractor's default to reach the conclusion that the contracting officer had abused his discretion. In the Court's September 14, 1994, order, it stated, "[t]he issue is not whether the contractors were in default, but whether they were properly terminated for default."[85]

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[81] Id.

[82] Id.

[83] Id.

[84] McDonnell Douglas Corp. v. United States, No. 91-1204C, Sep. 14, 1995 Order; see McDonnell Douglas Corp. v. United States, No. 91-1204C, Aug. 18, 1995 Order.

[85] McDonnell Douglas, Sep. 14, 1995 Order.

However, such refusal to hear other evidence is relatively rare. The contractor's default triggers the requirement for the Government to exercise discretion. If the contractor was not in default, the contracting officer had no right terminate for default, regardless of whether he or she exercised discretion. Consequently, most cases begin by analyzing whether the contractor was in default.

B. **Arbitrary and Capricious**

In exercising its discretion, the Government "must consider all relevant circumstances."[86] For the contracting officer's exercise of his or her discretion to be reasonable, it must: (1) not be arbitrary; (2) be based on the merits; (3) "demonstrate a consideration of available alternatives;" and (4) "be free from outside influence."[87] For a contractor to demonstrate that the Government's decision to terminate was arbitrary and capricious, it "must show there was no reasonable basis for the adverse administrative decision or that the procurement procedure involved a clear and prejudicial violation of applicable statues or regulations."[88]

Even though few cases fit into neat categories, the following factors are relevant in determining whether the Government abused its discretion in terminating the contractor for default:

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[86] See Kurz-Kasch, Inc., ASBCA No. 32486, Jul. 21, 1988, 88-3 BCA ¶ 21,053, at 106,335.

[87] JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOV'T CONTRACTS 981 (3d ed. 1995).

[88] International Verbatim Reporters, Inc., 9 Cl. Ct. 710, 715 (1986).

> (1) whether there was subjective bad faith on the part of the Government; (2) whether there was no reasonable basis for the decision; (3) the degree of discretion entrusted to the deciding official; and (4) whether there was shown to be a violation of an applicable statue or regulation.[89]

The court's or board's review of a contracting officer's discretion also includes an evaluation of whether someone else improperly influenced the terminating contracting officer. Another significant factor in evaluating whether the Government abused its discretion is the Government's motive in terminating for default.[90]

1. **Bad Faith**

Although some courts and boards of contract appeals have accepted the equivalence of bad faith and abuse of discretion,[91] bad faith is a much higher standard.[92] For a contractor to prove bad faith, it must show "some specific intent to injure the contractor" or "malice or conspiracy."[93] Bad faith

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[89] Quality Env't Sys., Inc., ASBCA No. 22178, Jul. 22, 1987, 87-3 BCA ¶ 20,060, at 101,569; see also Mega Constr. Co., Inc. v. United States, 29 Fed. Cl. 396, 422 (1993); Freedom, NY, Inc., ASBCA Nos. 35671, 43965, May 7, 1996, 96-2 BCA ¶ 28,328, at 141,474.

[90] See, e.g., Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).

[91] See, e.g., Mergentime Corp. v. Washington Metropolitan Area Transp. Auth., Civ. A. No. 89-1055, 1993 WL 328083 (D.D.C.) (unreported case) (equating a finding of pre-text with a finding of bad faith).

[92] See Kalvar Corp. v. United States, 543 F.2d 1298, 1301, n. 1 (Ct. Cl. 1976), cert. denied, 434 U.S. 830 (1977) (although not finding bad faith or abuse of discretion, the court noted that many prior decisions implicitly accept the equivalence of "bad faith, abuse of discretion, and gross error").

[93] Id.; Freedom, NY, Inc., ASBCA Nos. 35671, 43965, May 7, 1996, 96-2 BCA ¶ 28,328, at 141,474.

involves an added layer of proof over abuse of discretion.[94] A contractor must offer "well nigh irrefragable proof" of bad faith to induce a court or a board to overcome the presumption that public officials act "conscientiously in the discharge of their duties."[95] A contractor cannot overcome that burden with mere allegations of bad faith, even if those allegations are unrebutted.[96] The standard for showing bad faith in a termination for default is the same as that in a termination for convenience.[97] Because the standard is so high, few contractors, in either a termination for convenience or termination for default, have been able to prove bad faith on the part of the Government.[98] The facts in Apex International Management Servs. Inc.,[99] show how egregious the

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[94] Darwin Constr. Co. v. United States, 811 F.2d 593, 598 (Fed. Cir. 1987); Freedom, NY, Inc., supra note 93, at 141,474.

[95] Kalvar Corp., 543 F.2d at 1302-02; see Mega Constr. Co., Inc. v. United States, 29 Fed. Cl. 396, 422 (1993); Fanning, Phillips & Molnar, VABCA No. 3856, Feb. 22, 1996, 96-1 BCA ¶ 28,214, at 140,834; T.A. Indus., Inc., VABCA No. 2941, 90-3 BCA ¶ 22,967, at 115,345.

[96] Schmalz Constr., Ltd., AGBCA Nos. 86-207-1, 86-229-1, 86-255-1, Jul. 17, 1991, 91-3 BCA ¶ 24,183, at 120,963.

[97] See Mega Constr., 29 Fed. Cl. at 422; Fanning, supra note 95, at 140,834-35; ASA L. Shipman's Sons, Ltd, GPOBCA No. 06-95, Aug. 29, 1995, 1995 WL 818784, n. 16 (citing, Kalvar Corp., 543 F.2d 1298, a termination for convenience case); Larry D. Paine, ASBCA No. 41273, Aug. 18, 1995, 95-2 BCA ¶ 27,896, at 139,167-68.

[98] See, e.g., Mega Constr., 29 Fed. Cl. at 422 (finding that plaintiff did not meet its burden of proof in establishing bad faith in a termination for default); Kalvar Corp., 211 Ct. Cl. 192 at 1303 (finding that the Government's mere error, even if tantamount to a breach if the termination clause was inapplicable, was insufficient to show malicious intent to avoid the termination for convenience clause). For cases where courts and boards found bad faith, see Knotts v. United States, 121 F. Supp. 630 (Ct. Cl. 1954); Struck Constr. Co. v. United States, 96 Ct. Cl. 186, 222 (1942); Apex Int'l Management Servs., Inc., ASBCA Nos. 38087, 38241, Mar. 4, 1994, 94-2 BCA ¶ 26,842.

[99] ASBCA Nos. 38087, 38241, Mar. 4, 1994, 94-2 BCA ¶ 26,842.

Government conduct must be before a board will find bad faith. In that case, the Armed Services Board of Contract Appeals found that the Government workers "discharged their duties not only improperly and unfairly, but with hostility and malice, and with the manifest intention of proving that a private contractor could not successfully provide the services which had theretofore been rendered by Government public works employees."[100] Some of the many incidents the Board cited include: dumping trash in work areas the contractor would occupy; not furnishing manufacturers' manuals and other tools needed to operate equipment and "malevolently throwing some of them into trash dumpsters;" removing two-way radios from vehicles and telephones from work stations; "tearing out telephone wiring and air conditioning equipment from areas" the contractor would occupy under the contract; and "failing to make or delaying payments" to the contractor for work it had performed.[101] The Board held that this bad faith toward the contractor justified setting aside the termination for default.

When the Board set the default termination aside, however, it did not convert the default termination into a termination for convenience. Because the Government's conduct was motivated by bad faith, it could not rely on the Termination for Convenience clause. Consequently, the Board the contractor was "entitled to receive traditional breach of contract damages, including anticipatory profits."[102]

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[100] Id. at 133,548.

[101] Id. at 133,548-49.

[102] Id. at 133,550.

A contractor does not need to prove that the contracting officer decided to terminate in bad faith to prove abuse of discretion.[103]

2. **No Reasonable Basis for the Decision**

While it is easier for a contractor to prove abuse of discretion if it can point to a total absence of discretion or a pretext, many cases where a court finds abuse of discretion involve a termination that does not make sense under the circumstances.[104] In Monaco Enterprises v. United States the court, in an unpublished decision without precedential value, found that the contracting officer abused his discretion in terminating for default where there was "no showing that the contractor was unable or unwilling to perform, that the work was urgently needed, or even that the substitute contractor was likely to complete the system more expeditiously" and "other contractors on similar EMCS projects were not terminated for default despite having been given 300 plus more days than the period given Monaco." [105]

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[103] Darwin Constr. Co. v. United States, 811 F.2d 593, 598 (Fed. Cir. 1987); Executive Elevator Serv., Inc., VABCA No. 2152R, Aug. 21, 1987, 87-3 BCA ¶ 20,083, at 101,667.

[104] See, e.g., S.T. Research Corp., ASBCA No. 39600, Feb. 21, 1992, 92-2 BCA ¶ 24,838, at 123,928 (holding that is was "tantamount to an abuse of discretion" to terminate the contractor for default without a showing that it "was unwilling or unable to perform," "the work was urgently needed," or "a replacement contractor was likely to complete the system more expeditiously").

[105] 907 F.2d 159, 1990 WL 82,670 (Fed. Cir. 1990) (unpublished decision).

3. **Failure to Consider FAR Factors**

Before the contracting officer terminates for default, he or she must consider the factors in FAR 49.402-3(f) in a meaningful way.[106] For consideration to be meaningful, it must involve active and reasoned consideration of the circumstances surrounding the contractor's default.[107]

FAR 49.402-3(f), however, does not confer rights on a defaulting contractor to relief from the default termination.[108] Boards and courts do not focus solely on compliance with regulatory factors, but use the factors in determining whether the totality of the circumstances indicates that the contracting officer abused his or her discretion.[109] Therefore, a finding that the contracting officer failed to consider one or more of the factors required by FAR 49.402-3(f) is not tantamount to a finding of abuse of discretion.[110] For a contractor to prove that the Government's failure to consider a

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[106] Jamco Constructors, Inc., VABCA Nos. 3271, 3516T, Oct. 5, 1993, 94-1 BCA ¶ 26,405, at 131,361; Keco Indus., Inc. v. United States, 492 F.2d 1200, 1203-1204 (Ct. Cl. 1974).

[107] Jamco, supra note 106, at 131,361.

[108] DCX, Inc. v. Perry, 79 F.3d 132, 134 (Fed. Cir. 1996).

[109] Id.; Sach Sinha and Assoc., Inc., ASBCA No. 46916, May 14, 1996, 1996 WL 263288.

[110] DCX, 79 F.3d at 134; Sach Sinha, supra note 109 (holding that the contracting officer's failure to consider one of the regulatory factors was not "an automatic ticket to a termination for convenience"); Lafayette Coal Co., ASBCA No. 32174, May 9, 1989, 89-3 BCA ¶ 21,963, at 110,482 (holding that failure to consider one or more of these factors "is but one factor to consider in looking at the totality of the circumstances surrounding the contracting officer's actions"); International Elecs. Corp., ASBCA 18934, 76-1 BCA ¶ 11,817, at 56,430, recons. denied, 76-2 BCA ¶ 11,943, rev'd on other grounds, 646 F.2d 496 (Ct. Cl. 1981).

particular factor is an abuse of discretion, the contractor must show that this failure prejudiced it.[111]

a. Prejudice

A contractor will be prejudiced if the contracting officer's consideration of the factor may have influenced his or her decision.[112] The standard is similar to the harmless error rule in bid protests where an agency's violation of statute or regulations constitutes harmless error if it does not prejudice the protester.[113]

Several cases have held that the contracting officer's failure to provide a copy of a cure or show cause notice to the contracting office's small business specialist and the Small Business Administration Regional Office nearest the contractor, as required by FAR 49.402-3(e)(4), did not constitute an abuse of discretion.[114] In these cases, the contractors have failed to show they were prejudiced by this lack of notice. In Darwin Construction

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[111] Shepard Printing, GPOBCA No. 23-92, Apr. 29, 1993, 1993 WL 526848; Darwin Constr. Co., GSBCA No. 10193, Oct. 16, 1990, 91-1 BCA ¶ 23,419, at 117,487.

[112] Schmalz Constr., Ltd., AGBCA Nos. 86-207-1, Jul 17, 1991, 91-3 BCA ¶ 24,183, at 120,963.

[113] Danrenke Corp., VABCA No. 3601, Aug. 18, 1992, 93-1 BCA ¶ 25,365, at 126,340 (quoting Darwin Constr. Co., GSBCA No. 10193, Oct. 16, 1990, 91-1 BCA ¶ 23,419, at 117,487); Darwin, at 117,487.

[114] See, e.g., S&W Associates, DOTBCA No. 2633, May 6, 1996, 96-2 BCA ¶ 28,326, at 141,454 (finding "[t]he requirement to send a copy of the 'show cause' letter to the small business specialist and the Small Business Administration is for informational purposes" and did not invalidate the default termination).

Co.[115] the uncontroverted testimony from the director of GSA's Office of Small and Disadvantaged Business Utilization indicated that, even if the contracting officer sent a copy of the show cause notice to the small business specialist, nothing would happen unless the contractor actively requested help. The General Services Board of Contract Appeals discounted the contractor's allegation that it would have asked for such help when it failed to provide a substantive response to the show cause order. The Board upheld the termination for default because it found that the contractor failed to prove that violation of the regulatory requirements impacted the termination decision.[116]

If the Government gives the contractor an opportunity to respond to a cure notice or a "show cause" letter, the contractor, in its response, should highlight circumstances during the administration of the contract that may impact the termination decision, even if those circumstances do not excuse the default. The Government may use the contractor's failure to highlight these circumstances against it at trial to show that the contractor did not believe these factors were significant enough impact the termination decision.[117] In Container Systems Corp.[118] the Armed Services Board of

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[115] Darwin Constr. Co., No. GSBCA 11363 (10193)-REIN, Jul. 23, 1992, 93-1 BCA ¶ 25,283, at 125,920.

[116] Id. at 125,921.

[117] See, e.g., Spectrum Leasing Corp., ASBCA No. 25724, Dec. 18, 1984, 85-1 BCA 17,822 (noting that "the more logical explanation for the failure of the COR to inform the contracting officer of [three circumstances the contractor alleged the COR should have told the contracting officer] was that the COR, during the course of performance, was never advised that Spectrum considered each circumstance to be a cause of excusable delay").

[118] ASBCA No. 40611, Sep. 2, 1993, 94-1 BCA ¶ 26,354.

Contract Appeals noted that the contractor, in its response to the show cause letter, had not raised the circumstances it complained the Government had not considered. The Court used this fact to support its finding that five of the circumstances the contracting officer did not consider would not have made a difference in the decision to terminate.[119]

Because the importance of any one factor is so fact specific, whether a contracting officer's admitted procedural error constitutes abuse of discretion will rarely be appropriate for summary judgment.[120] In AFTT, Inc.[121] the Board found that contracting officer had not considered FAR 49.402-3(f)(4), the urgency of the need for the supplies, and many other factors. Despite its findings, the Board refused to grant the contractor summary judgment on abuse of discretion because the "record could permit the Board to make findings concerning ongoing problems with the Appellant's tardy submittals, its dealings with its subcontractors, its lack of proper on-site supervision, its poor workmanship and its failure to make timely corrections."[122] The Board recognized that, where the facts showed a "past pattern of deficient performance coupled with poor planning and inadequate supervision," the

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[119] The Board found that the contracting officer's failure to consider the sixth consideration, whether the default was economical to the Government, was not fatal to the termination. Id. at 131,092.

[120] See, e.g., Danrenke Corp., VABCA No. 3601, Aug. 18, 1992, 93-1 BCA ¶ 25,365 (denying motion for summary judgment because of remaining question of fact as to the extent which the contracting officer failed to consider the factors in FAR 49.402-3); Darwin Constr. Co., GSBCA No. 10193, Oct. 16, 1990, 91-1 BCA ¶ 23,419, at 117,487 (finding that it could not determine whether procedural errors were prejudicial based on the evidence before the board on summary relief).

[121] VABCA No. 3783, June 30, 1994, 94-3 BCA ¶ 27,014, at 134,646.

[122] Id. at 134,645.

contracting officer's failure to consider all the FAR factors was not significant enough as a matter of law to find abuse of discretion on summary judgment.[123]

b. The Specific Failure of the Contractor and The Excuses For The Failure

Where the contracting officer justifies a termination on a ground he or she did not even know about at the time of the termination, he or she could not have exercised discretion on a very important factor—consideration of "the specific failure of the contractor and the excuses for the failure." However, the inability to consider the contractor's specific failure in such circumstance does not mean that the contracting officer abused his or her discretion. If the contracting officer considered all the factors known to him at the time he rendered his decision to terminate for default, a court or board will find that he reasonably exercised his discretion.

In Spread Information Sciences, Inc.[124] the Board recognized it could not review this factor in cases where the Government justifies the termination on a later discovered ground. The Board, however, found that this limitation did not prevent the contracting officer from exercising discretion. It evaluated the contracting officer's discretion based on the factors that could be readily reviewed. It found that the contracting officer "was not improperly motivated," "reasonably considered all the factors which FAR 49.402-3(f) requires to be considered before termination for default (at least under the Default clause),"

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[123] Id. at 134,646.

[124] ASBCA No. 48438, Sept. 29, 1995, 96-1 BCA ¶ 27,996.

and "did not abuse her discretion in any other respect."[125] Because the later discovered ground was a valid basis to justify the termination and the contractor failed to offer proof that "the contracting officer would not have exercised her discretion to terminate on that ground," the Board upheld the contracting officer's decision.[126]

A contractor will have a difficult time showing that a contracting officer would not have exercised discretion on a ground that the contracting officer never considered at the time of default, and on which the contracting officer relies when the contractor appeals the termination. The contractor, however, may show that the Government abused its discretion in deciding to default on the original grounds. In McDonnell Douglas the Court held that the Navy could not use a post hoc justification where the Government failed to exercise discretion and the proffered default was not egregious enough.[127] The Court stated, "[t]he Government's failure to use reasoned discretion when terminating a contract is not a procedural defect that it may correct later."[128]

c. Urgency of the Need And the Period of Time Required to Obtain Supplies or Services From Other Sources, as Compared with the Time Delivery Could be Obtained From the Delinquent Contractor

The contracting officer's failure to consider the period of time required to obtain the supplies or services from another contractor, as compared to

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[125] Id. at 139,836.

[126] Id.

[127] 35 Fed. Cl. 358, 374 (1996).

[128] Id. at 369.

the delinquent contractor, is a factor frequently cited by boards and courts finding that the Government abused its discretion. The requirement for the Government to consider this factor, however, does not mean that the Government must refrain from terminating a contractor in default simply because that contractor may be able to complete the project faster than a replacement contractor.[129] Other factors may outweigh the fact that the incumbent contractor can perform more quickly than other sources.

Where a contracting officer fails to adequately consider the time to obtain supplies or services from other sources, the critical issue is whether the contracting officer's failure to consider this factor prejudiced the contractor. How important was this factor was in the contracting officer's decision to terminate for default? A contracting officer who places great emphasis on the time factor in determining to default must show that the Government's estimates of the amount of time it would take for another contractor to complete as compared to the defaulting contractor are reasonable and supported by sound methodology.[130]

In Jamco the contracting officer considered time to be an overriding consideration. Yet he failed to inquire into contradictory information from the contracting officer's Technical Representative (COTR) regarding when the contractor might complete.[131] Additionally, although the contracting officer testified that, at the time he terminated, he believed it would take another

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[129] AFTT, Inc., VABCA No. 3783, June 30, 1994, 94-3 BCA ¶ 27,014, at 134,646 (quoting Jamco Constructors, Inc., VABCA Nos. 3271, 3516T, Oct. 5, 1993, 94-1 BCA ¶ 26,405).

[130] Jamco Constructors, Inc., VABCA Nos. 3271, 3516T, Oct. 5, 1993, 94-1 BCA ¶ 26,405.

[131] Id.; see AFTT, Inc., supra note 129 (discussing Jamco).

contractor "a very short period of time" to complete the project, he could not explain the basis of his belief. The contracting officer also testified that he believed it would take Jamco "200 plus days" to complete. He stated that had he known the COTR estimated another contractor would take 180 days to complete, this fact would have altered his view of his "course of action." Given these facts, the Board concluded that the contracting officer abused his discretion in failing to adequately inquire into the period of time required to complete the contract.[132]

Where other factors strongly indicate that a termination for default is proper, a court or board may find that the contracting officer did not abuse his or her discretion even where he or she failed to consider the time it would take another contractor to procure the goods or services. In Michigan Joint Sealing, Inc. the contractor failed to provide a completion schedule in response to the Air Force's cure notice.[133] There was also a "wide disparity between the percentage of work complete and the time remaining in the performance period."[134] Additionally, at trial, the contractor's own analysts conceded they could not have performed the contract by the completion date. Given these facts, the Board found that the contracting officer did not need to perform a detailed analysis of how long the contractor would take to complete.[135]

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[132] Jamco, supra note 130, at 131,362-63.

[133] ASBCA No. 41477, Apr. 26, 1993, 93-3 BCA ¶ 26,011.

[134] Id. at 129,325.

[135] Id.

d. Other Pertinent Facts and Circumstances

If the contracting officer possesses information relevant to the specific contract that he or she does not consider, a board or a court may find abuse of discretion. In Kurz-Kasch[136] the parties had a long course of dealings in which the Army had granted deviations for specifications involving molding fiberglass. Given this course of dealings, the Board found that the contracting officer abused his discretion where he failed to consider the Configuration Control Board's recommendation for approval of minor deviations that the contractor had requested before terminating the contract for default.[137]

Additionally, if the Government issues a cure notice for something requiring a cure notice, discretion requires that it consider the contractor's proposed cure.[138]

Boards and courts are less likely to require a contracting officer to consider more remote circumstances. In cases in which the contractor argues that the contracting officer should have considered facts or circumstances other than those listed in subsections (1)-(6), informing the contracting officer of those circumstances and how they are relevant before the termination for default is especially crucial. In Phoenix Petroleum Co. the Board upheld the contracting officer's discretion even though he failed to

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[136] ASBCA No. 32486, Jul 21, 1988, 88-3 BCA ¶ 21,053.

[137] Id. at 106,334-35.

[138] Cervetto Building Maintenance Co. v. United States, 2 Cl. Ct. 299, 303 (Cl. Ct. 1983) (converting a termination for default to one for convenience even though the court doubted whether the contracting officer would have reached a different decision had he waited and properly considered plaintiff's efforts to cure).

consider the adverse impact of the termination on "the people and economy of West Virginia" under factor (f)(7).[139] The Board noted that, even if these facts were relevant, the contractor failed to provided the contracting officer with this information. The Board found that the contracting officer had properly focused instead on finding a reliable source of fuel to replace the contractor.[140]

Additionally, boards generally find an agency's waiver of termination on other contracts to be too remote to find that the contracting officer abused his or her discretion in terminating the contract at issue.[141]

4. **Motive**

a. Historically: The case law is somewhat conflicting regarding the extent to which a court or board may consider the motive of the Government. Historically, the boards of contract appeals refused to consider the Government's motive where the Government followed correct procedures and had a right to terminate.[142] In Nuclear Research Associates[143] the Board

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[139] Phoenix Petroleum Co., ASBCA No. 42763, Apr. 11, 1996, 96-2 BCA ¶ 28,284, at 141,214.

[140] Id.

[141] See Sierra Tahoe Mfg., Inc. v. General Servs. Admin., GSBCA No. 12679, Mar. 15, 1994, 94-2 BCA ¶ 26,771, at 133,158.

[142] See George H. Robertson, HUDBCA No. 76-31, Feb. 28, 1978, 78-1 BCA ¶ 13,035, at 63,578 (holding "motivation is not examined, where independent grounds for default action exists, and where that right is properly exercised"); Artisan Electronics Corp., ASBCA No. 14154, Nov. 30, 1972, 73-1 BCA ¶ 9807, at 45,824 (stating "[w]hether the Government had any need for the supplies is irrelevant to its right to terminate for default"); Standard Mfg. Co., ASBCA 13624, 72-1 BCA ¶ 9317, at 43,508; Interspace Eng'g & Support, ASBCA No. 14459, Apr. 17, 1970, 70-1 BCA ¶ 8263, at 38,400 (holding "that the contracting officer's motivation in terminating a contract for default is a matter of administrative discretion not reviewable by the Board where the

refused to examine the contracting officer's motive in terminating for default. The Nuclear Research Board stated, "default termination is a matter of right, not motive. If the right clearly exists, the Board does not examine into the contracting officer's 'motives' or judgment leading to its exercise."[144]

b. Darwin

In Schlesinger, the Court discussed in detail the contractor's appearance before a Senate Subcommittee investigating textile procurement and noted that Mr. Schlesinger was "a prime suspect in connection with certain alleged irregularities."[145] It contrasted this factual background against the Government's lack of "concern for the contractor or whether a default would be excusable," its failure to consider "a possible waiver or an extension," and the fact it did not consider whether termination for convenience would be appropriate.[146] The Court concluded that the contractor's technical default was merely a pretext for the Government's real reason for terminating the contract.[147] The Court's discussion of the underlying reasons behind the Government's resolution to terminate the contractor for default suggests that it considered the Government's motive to

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right to terminate for default exists and where that right is properly exercised"); Nuclear Research Assocs., ASBCA No. 13563, Mar. 31, 1970, 70-1 BCA ¶ 8237, at 38,285; JOHN CIBINIC, JR., RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 982 (3d ed. 1995).

[143] ASBCA 13563, Mar. 31, 1970, 70-1 BCA ¶ 8237.

[144] Id. at 38,285.

[145] 300 F.2d. 702, 705 (Ct. Cl. 1968).

[146] Id. at 708.

[147] Id. at 709.

be relevant to the issue of whether the Government exercised discretion. The fact that the Government's termination was not based on contractor performance issues, but on a desire to get rid of the contractor to appease the Senate Subcommittee certainly influenced the Court's finding that the Government abdicated its discretion.[148]

Although early board decisions did not read Schlesinger to support a finding that motive was relevant,[149] Darwin Construction Co. v. United States overruled that line of cases as "squarely in conflict with Schlesinger."[150]

In Darwin Construction Co. v. United States the Court found that the Navy defaulted "solely to rid the Navy of having to further deal with Darwin."[151] The Court rejected the Government's argument that it should not inquire into the motives or judgment of the contracting officer.[152] In doing so, it overruled Nuclear Research Associates.[153] Because the default decision was arbitrary or capricious, the Darwin court ordered it set aside and the termination converted to one for convenience.[154]

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[148] See Id.

[149] See Standard Mfg. Co., ASBCA 13624, Mar. 9, 1972, 72-1 BCA ¶ 9371.

[150] See Darwin Constr. Co. v. United States, 811 F.2d 593, 596 (Fed. Cir. 1987) (overruling a Board finding that it could not inquire into the motives of the contracting officer).

[151] Id. at 594.

[152] Id. at 596.

[153] Id. (citing Nuclear Research Assocs., Inc., ASBCA No. 13563, 70-1 BCA ¶ 8,237 (1970)).

[154] Id. at 598.

c. Post Darwin

Since Darwin, the Boards of Contract Appeals have recognized that they should consider motive in determining whether the contracting officer abused his or her discretion,[155] although they have been reluctant to find abuse of discretion based on motive alone. [156] Walsky Construction Co.,[157] demonstrates the line the Board has walked since Darwin in considering evidence of bad motive as relevant to the propriety of the default decision without overturning the decision merely because the Government had a bad motive.

In Walsky the Board found "that the Government's administration of this contract was impermissibly influenced by the directive of the Director of Contracting to monitor Walsky more than normal, and to default 'if the smallest thing goes wrong.'"[158] It found that "[t]his directive colored virtually every aspect of the administration of this contract." Yet the terminating contracting officer (TCO) failed to consider whether this directive had improperly motivated the Air Force administrative contracting officer (ACO) to recommend termination for default. Additionally, the Board found that the TCO failed to consider any of the FAR termination factors "in a meaningful

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[155] See, e.g., Jamco Constructors, Inc., VABCA Nos. 3271, 3516T, Oct. 5, 1993; 94-1 BCA ¶ 26,405; AIW-Alton, Inc., ASBCA No. 45032, Mar. 14, 1996, 96-1 BCA ¶ 28,232; Graphics Image, Inc., GPOBCA No. 13-92, Aug. 31, 1992, 1992 WL 487875, n. 28.

[156] Walsky Constr. Co., ASBCA No. 41541, Feb. 9, 1994, 94-2 BCA ¶ 26,698, at 132,785.

[157] Id.

[158] Id.

way" prior to terminating the contractor for default.[159] Although the Board stated "that the mere existence of 'bad motive,' without more, does not require the reversal of a default termination," the Board considered motive in the totality of the circumstances.[160] It held that the Government had abused its discretion where the bad motive of wanting to get rid of the contractor was accompanied by the TCO's failure to consider the totality of the circumstances surrounding default.[161]

More recent board cases have been willing to apply motive in a broader context. In AIW-Alton, Inc. the Armed Services Board of Contract Appeals recognized that it should consider "motive and judgment" in determining "if the exercise of discretion to terminate for default was reasonable and not arbitrary or capricious," even though it declined to find that the contracting officer abused her discretion in terminating the contract.[162]

d. Improper Motives—Court of Federal Claims

The case law does not articulate a cohesive rule for which motives are proper and which are improper. In McDonnell Douglas the Court of Federal Claims suggested that the Government had an improper motive where the

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[159] Id.

[160] Id. at 132,784.

[161] Id.

[162] AIW-Alton, Inc., ASBCA No. 45032, Mar. 14, 1996, 96-1 BCA ¶ 28,232, at 140,979.

underlying reason the Government defaulted was not "contractor performance or default."[163]

In that case, the Secretary of Defense sent the Navy a memorandum asking it to show cause "why the Department should not terminate the A-12 program and pursue other alternatives." When the Office of the Secretary of Defense (OSD) refused to obligate any additional funds for the program, the contracting officer rushed to terminate for default, even though he would have preferred to continue the contract.[164] The Court of Federal Claims found that the Navy did not terminate the contract because of the contractor's default, but because "the Office of the Secretary of Defense withdrew support and funding."[165]

In addition to terminating for this improper, non-performance related motive, the Court found that "OSD directed both the timing and the substance of the cure notice. . . .The decision to terminate for default was dictated by the Office of the Secretary of Defense's representations that it would not support the program."[166] Under these circumstances, the Court held that the Navy abused its discretion.

McDonnell Douglas demonstrates the complexities caused when a court examines motive. In the memorandum Secretary Cheney sent to the Navy asking them to show cause why the program should not be terminated, he based his decision on the fact that "apparent schedule slippage, cost

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[163] McDonnell Douglas v. United States, 35 Fed. Cl. 358, 371-72 (1996).

[164] Id. at 366-68, 371.

[165] Id. at 371.

[166] Id. at 370-71.

growth and management deficiencies in this program are intolerable."[167] The schedule slippage was one of the defaults cited in the termination notice.[168] The Government argued that OSD based its decision to withdraw support and funding entirely on performance-related matters—the contractors defaults in failing to achieve contract specifications, in not meeting the delivery schedule, and in requesting additional money to complete the contract.[169] However, the Court rejected the Government's argument. Throughout its opinion, the Court characterized the Secretary of Defense's interest as financial and improper. It states, "[Secretary Cheney's] concerns were limited to cost and schedule;"[170] "OSD's concerns were financial;"[171] and "[i]f the Secretary did terminate the contract, the reason was not for contractor default."[172] The record contained sufficient evidence for the Court to have found that OSD was also concerned with what it perceived to be the contractor's defaults, even if the Secretary of Defense did not exercise the requisite discretion to terminate for default. The Court's belief that the Navy abdicated its discretion colored its finding that OSD's concerns were improper motives.

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[167] Id. at 354.

[168] Id. at 368.

[169] McDonnell Douglas v. United States, No. 91-1204C, Defendant's Motion for Judgment Upon Count XVII, at 12 (on file with author). In it's November 5, 1993 Order at 1, in it's proposed findings, the court recognized that OSD acted upon these problems.

[170] McDonnell Douglas, 35 Fed. Cl. at 366.

[171] Id. at 371.

[172] Id. at 372.

McDonnell Douglas is the first discretion case to consider facts in which the contracting officer terminated a program for default after the Government formally decided to cancel the program. The Office of Secretary of Defense had every right to terminate the program for convenience. If the contractor was in default and OSD canceled the program, prior case law would allow the contracting officer to consider the fact that there was no longer a need for the supplies in determining the best course of action.[173]

Additionally, FAR 49.402-3(f) contemplates that the Government will consider non-performance related factors in determining its best interests. For example, the degree of essentiality of the contractor in the Government acquisition program is not related to the performance of the contract. The duty to review "pertinent facts and circumstances"[174] also gives the Government broad discretion to consider a wide range of circumstances the Government believes are relevant to the contract, even if they are not relevant to narrow issues of performance and the contractor's default.

The McDonnell Douglas ruling does not state that a contracting officer cannot consider these circumstances. It suggests, however, that the Court of Claims may find an improper motive if peripheral circumstances motivated the initial decision to terminate for default, even though the contracting officer may properly consider those peripheral circumstances in deciding whether he should terminate for default once the contractor's performance or default motivates the Government to take some action.

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[173] Kurz-Kasch, Inc., ASBCA No. 32486, Jul. 21, 1988, 88-3 BCA ¶ 21,053, at 106,335; Hydraulic Sys. Co., ASBCA No. 16856, Oct. 26, 1972, 72-2 BCA ¶ 9742, at 45,534.

[174] FAR 49.402-3(f)(7).

The holding in McDonnell Douglas chills the contracting officer's right to terminate for default where superior officials decide to cancel the program and withdraw funding. Typically, program personnel, not the contracting officer, decide to cancel a program. Therefore, the impetus to cancel and withdraw funding is unlikely to come from the contracting officer. For a contracting officer in such a situation to exercise discretion, she must recognize and consider her ability to choose from a whole host of options, including termination for convenience.

e. Improper Motives—Boards of Contract Appeals

The Boards of Contract Appeals have not been willing to apply such a broad rule to finding of an improper motive. For example, they have consistently held that the Government may properly consider the fact that it no longer had a need for the items in deciding whether to terminate for default,[175] even though the Government's need does not relate to the contractor's performance or default.

Whether the Government needs the item is inextricably related to the urgency of the need. The urgency of the need is a factor that FAR 49.402-3(f)(4) requires the contracting officer to consider. If the Government urgently needs the item, it may waive default.[176] Where it no longer needs the item, waiving the default may not normally be in the Government's best interests.[177] In American General Fabrication, Inc. the Board held that "an otherwise

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[175] See Kurz-Kasch, Inc., supra note 169, at 106,335.

[176] Hydraulic Sys. Co., supra note 169.

[177] Id.

justified termination for default does not lose its validity because the Government no longer has need for the item being purchased, even where the lack of need is part of the motivation for the termination." [178]

Given the broad circumstances that boards of contract appeals have allowed the Government to consider in determining whether to terminate for default and their historical reluctance to find a contracting officer's motives improper, it is unlikely they will follow McDonnell Douglas and narrow the range of proper motives to considerations relating only to the contractor's performance or its default.

5. **Abdication of Discretion**

Many of the cases that involve an improper motive also involve directions from a higher authority that the contracting officer accepts without question. If someone improperly influences the contractor to terminate for default, this represents "an abdication rather than an exercise of discretion."[179]

a. Level of Authority of Person Advising the Contracting Officer

The rank and importance of the person seeking to exercise control over the contracting officer's decision is central to whether a board or court will find that the contracting officer abdicated his or her discretion. In

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[178] ASBCA No. 43518, Mar. 19, 1992, 92-2 BCA ¶ 24,955, at 124,363; see Scandia Mfg. Co., ASBCA No. 20888, June 9, 1976, 76-2 BCA ¶ 11,949.

[179] Fairfield Scientific Corp. v. United States, 611 F.2d 854, 862 (Ct. Cl. 1979); Jamco Constructors, Inc., VABCA Nos. 3271, 3516T, Oct. 5, 1993, 94-1 BCA ¶ 26,405, at 131,361 (quoting Fairfield).

Environmental Devices, Inc.[180] the contractor argued that the Air Force's item management (IM) office had pressured the contracting officer to terminate for default and that she had abdicated her responsibility to exercise her own free will. The Board highlighted the fact that the IM specialist who had contacted the contracting officer monthly was only a General Services (GS) grade 5[181] employee with less than one year of experience and that IM simply advised the TCO that it did not want to have EDI's contract extended. Given the nature of IM's contacts with both the contracting officer and the terminating contracting officer (TCO), the Board found nothing to suggest that the TCO failed to exercise discretion.[182]

In Spectrum Leasing Corp. the Board reached a similar result where the person who was alleged to have improperly influenced the contracting officer was an inexperienced Contracting Officer's Representative (COR).[183] The COR recommended to the contracting officer that he terminate the contractor for default. The contractor argued that the contracting officer abdicated his discretion when he accepted his COR's recommendation and terminated the contractor. The Board found that the COR did not notify the contracting officer of Spectrum's request for a time extension or of delayed deliveries. He also provided the contracting officer with an incorrect report on the IBM/Spectrum relationship. Despite these findings, the Board held that the contracting officer properly exercised his discretion. It stated, "[w]hen the

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[180] ASBCA No. 37430, 39308, 39719, May 24, 1993, 93-3 BCA ¶ 26,138.

[181] GS-5 is an entry level grade.

[182] Environmental Devices, Inc., ASBCA No. 37430, May 24, 1993, 93-3 BCA ¶ 26,138, at 129,938.

[183] ASBCA No. 25724, 26049, Dec. 18, 1984, 85-1 BCA ¶ 17,822.

COR recommended default, appellant was in default and appellant had no recognized excuse for its default. The acceptance of the COR's recommendation by the contracting officer was justified."[184] This statement is the Board's best explanation of its finding that the contracting officer did not abdicate his discretion. However, one could argue that the COR's rank and inexperience were relevant facts in the Board's conclusion that the contracting officer did not surrender his power of choice to the COR.

The terminating official also may consider and rely on advice from his or her peers.[185] In Kit Pack Co.[186] the Armed Services Board of Contract Appeals refused to find that a terminating contracting officer abused his discretion when he terminated in reliance on a memorandum prepared by the Procurement Contracting Officer (PCO) describing the contractor's default, its capabilities, and conversations between the parties. Although the TCO did not draft a separate memorandum explaining the reasons for termination, the Board found that the TCO exercised his independent judgment in deciding to terminate.[187]

The fact that the contracting officer confers with agency personnel who actually use the supplies or services does not mean that the contracting officer abdicated his or her discretion.[188] Rather, such communication is

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[184] Id. at 89,198.

[185] See, e.g., Container Sys. Corp., ASBCA No. 40611, Sep. 2, 1993, 94-1 BCA ¶ 26,354, at 131,092 (holding that the "contracting officer's reliance upon information and advice provided by others does not negate the independence of his decision").

[186] ASBCA No. 33135, July 31, 1989, 89-3 BCA ¶ 22,151.

[187] Id. at 111,488.

[188] Environmental Devices, Inc., ASBCA No. 37430, 39308, 39719, May 24, 1993, 93-3 BCA ¶ 26,138, at 129,938.

critical to the contracting officer making an informed decision about the best interests of the Government.[189]

The outcome is predictably different where suggestions or directives come from a higher authority, such as Congress or higher headquarters. A contracting officer abdicates his discretion where he simply carries out the directives of his superior. In Tora and Williams Corp.[190] the contracting officer "could not say 'either way' whether he," or his supervisor made the decision to termination for default.[191] Where there was no evidence that the superior weighed relevant factors, the Board found that the contracting officer had abused his discretion.

The fact that a higher authority phrases its comments as suggestions does not end the inquiry into their influence. The key to their influence is how the contracting officer reacts to the suggestions.[192]

Schlesinger is the classic case where the Government surrendered its discretion in response to Congressional suggestions to terminate and pressure from higher headquarters. In Schlesinger the contractor was called to testify before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations that was investigating textile procurement in the military. The Subcommittee suspected the contractor of irregularities. The Navy's Bureau of Supplies and Accounts for Purchasing

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[189] Nuclear Research Corp. v. United States, 814 F.2d 647, 650 (Fed. Cir. 1987).

[190] DCCAB No. D-839, Mar. 7, 1994, 1994 WL 750301.

[191] Id.

[192] See Schlesinger v. United States, 390 F.2d 702, 708 (Ct. Cl. 1978); McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358 (1996).

(the Bureau) notified the contracting officer that the Chairman of the Senate Subcommittee had sent a letter implying that the Navy should cancel the contract. The Bureau then sent a telegram instructing the contracting officer to "Terminate contract * * * immediately for default. Advise when this action completed." The Court recognized that the Congressional communication did not suggest that the Navy terminate the contractor without considering the totality of the circumstances. However, it found that upon receipt of this communication, the Navy "simply surrendered its power of choice"[193] and "acted as if it had no option but to terminate for default (barring all compensation) once the mere fact of non-delivery was found."[194] The Court held that "Plaintiff's status of technical default served only as a useful pretext for the taking of action felt to be necessary on other grounds unrelated to the plaintiff's performance or the propriety of an extension of time. . . . [T]he Navy used the termination article as a 'device' and never made a 'judgment as to the merits of the case. '"[195] The Court found that "[s]uch abdication of responsibility" was an abuse of discretion.[196]

b. Timing of the Default

A contracting officer's rush to terminate for default after receiving suggestions from others may also indicate that he abdicated his discretion. In Graphics Image, Inc. the Board found:

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[193] Schlesinger, 390 F.2d at 708.

[194] Id.

[195] Id. at 709 (citing John A. Johnson Contracting Corp. v. United States, 132 F. Supp. 698, 705 (Ct. Cl. 1955)).

[196] Id. at 709.

> the haste with which the Contracting Officer defaulted the appellant's contract—he spoke to the Appellant, wrote to the CRB seeking approval to terminate the contract, and issued his termination letter all on the same day (December 31, 1991)—suggests to the Board that he was impelled to act by a desire to mollify [the customer agency's Lead Visual Information Specialist].[197]

The Board held that this haste, combined with the contracting officer's failure to consider either the contractor's excuse of defective government-furnished property or the contractor's offer to cure under a new contract delivery schedule, indicated that the termination decision was arbitrary and an abuse of discretion.[198]

In McDonnell Douglas the contracting officer attended a meeting on Sunday, January 6, 1991, during which the Under Secretary of Defense for Acquisition notified him that OSD would not support the program and would not obligate additional funds for the program.[199] That afternoon the contracting officer contacted NAVAIR legal counsel and told her he would terminate the A-12 contract for default the next day.[200] By noon of the next day, he approved the termination memorandum after less than an hour of review.[201] The Court found that this haste indicated that the Navy had abdicated its discretion. It stated:

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[197] Graphics Image, Inc., GPOBCA No. 13-92, Aug. 31, 1992, 1992 WL 487875.

[198] Id.

[199] McDonnell Douglas, 35 Fed. Cl. at 366.

[200] Id. at 367.

[201] Id. at 367-68.

> Admiral Morris' rush to terminate the contract makes sense only in light of OSD's December 15 show cause letter. Morris had not contemplated issuing a cure notice until the Navy received that directive. . . . The decision to terminate for default was dictated by the Office of the Secretary of Defense's representation that it would not support the program.[202]

C. **Documentation**

The courts and boards of contract appeals look at the total record in deciding whether the Government reasonably exercised its discretion. While the contracting officer's memorandum describing his or her reasons for defaulting the contractor may be relevant, it is not controlling.[203] In Kit Pack Co. the Board found that "the TCO's failure to prepare a memorandum is not an abuse of discretion of such magnitude that the default termination should be converted to one for convenience."

In contrast, a memorandum which seemingly documents the fact that a contracting officer exercised his discretion but does not accurately represent the decisional process may actually persuade a court that the contracting officer did not exercise his discretion. In McDonnell Douglas the termination contracting officer prepared a memorandum that, on its face, purported to consider the FAR 49.402-3(f) factors.[204] The memorandum considered the

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[202] Id. at 370-71.

[203] See, e.g. Shepard Printing, GPOBCA No. 23-92, Apr. 29, 1993, 1993 WL 526848 (looking to the record in finding that the contracting officer considered at least three of the eight FAR factors despite the fact that his memorandum did not address any of them).

[204] Memorandum from Rear Admiral W.R. Morris For the Contract File, Termination for Default on Contract N00019-88-C-0050 (Jan. 7, 1991) (on file with author).

terms of the contract, the specific failure of the contractors, the fact that the A-12 aircraft was only available from McDonnell Douglas Corp. and General Dynamics (the two contractors on the A-12 contract),[205] the degree of essentiality of McDonnell Douglas and General Dynamics to the Government acquisition program, and the fact that the contractors would not be able to repay the progress payments under the contract.[206] When the Court examined the total record, however, it discovered that legal counsel, not the contracting officer, prepared the memorandum and did so without consulting the contracting officer or reviewing the contractors' claims and their responses to the cure notice.[207] The Court noted that the "memorandum was cribbed from another program."[208] The Court also found that the contracting officer "did not consult with technical personnel," "did not review the contractors' claims for equitable adjustments," and "could not give adequate attention to the claims that may have excused the alleged defaults in that time."[209] These circumstances under which the Government prepared the memorandum influenced the Court's decision. The Court stated, "the manner in which it was prepared provides evidence of improper termination in the circumstances of this case." Based on these facts, the Court found that the

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[205] "The A-12 in the configuration proposed by the team is probably available only from the team." Id. at 4.

[206] "There is no reason to believe that the contractor will be able to repay the progress payments under this contract." Id. at 5.

[207] McDonnell Douglas, 35 Fed. Cl. at 367.

[208] Id. at 371.

[209] Id.

memorandum showed "that consideration of the FAR factors was non-existent."[210]

The courts and boards of contract appeals appropriately focus on whether the contracting officer actually exercised his or her discretion, regardless of memoranda documenting his or her decision. An order in McDonnell Douglas highlights this focus:

> This case is not about procedural error. Had Admiral Morris omitted to use proper boilerplate in his notice to cure or termination decision, then this case would be similar to State of Florida. The problem is not that a mere procedural error may cause the public to suffer an unwarranted forfeiture; the problem is that the contracting officer did not make a decision that the law required him to make.[211]

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[210] Id.

[211] McDonnell Douglas v. United States, No. 91-1204C, May 19, 1995 Order (distinguishing State of Florida, 33 Fed. Cl. 188, 1995 WL 251940 (1995)).

CHAPTER V.

CONSEQUENCES OF ABUSE OF DISCRETION

A. Conversion of Default to Termination for Convenience

Generally, once a court or board finds that the Government's decision to terminate was arbitrary and capricious, it remedies the defect by converting the termination for default into one for the convenience of the Government.[212] The Termination for Default clause states that "if, after termination, it is determined that the Contractor was not in default, or that default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government."[213] In Schlesinger the Court looked at the remedy for abuse of discretion in two ways. The Court preferred the view that "the termination notice was a nullity and therefore there was no valid end of performance on the ground of default."[214] The lack of a valid termination notice meant that the Government had terminated based on "an unsound ground and in an illegal manner."[215] Therefore, the termination for default "must be treated, not as a breach of contract, but as a termination for convenience."[216]

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[212] Darwin Constr. Co., Inc. v. United States, 811 F.2d 593, 596 (Fed. Cir. 1987); Quality Env't Sys. v. United States, 7 Cl. Ct. 428, 432 (1985).

[213] FAR 52.249-8(g); FAR 52.249-9(g); see FAR 52.249-8(c). Subsection (c) states, "Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the subcontractor."

[214] 390 F.2d at 709.

[215] Id.

[216] Id. at 710 (emphasis added).

Schlesinger also provided an alternative theory, that the Government's conduct was an intervening cause that created the contractor's failure to perform. This theory is weak because it does not accurately depict the order of events in most default terminations. The contractor may have been in default solely due to its own causes before the requirement for the Government to exercise discretion was ever triggered. Where the contractor's default motivates the Government to terminate, the default will always precede the requirement for the Government to exercise discretion. The Government's lack of discretion did not cause the contractor's failure to perform. Therefore, the lack of discretion should not serve as a basis for finding that the failure to perform was beyond the control, or without the fault or negligence of the contractor.

Schlesinger, however, recognized that under either theory, conversion to a termination for convenience was the proper remedy. Other courts and boards finding that the contracting officer abused his or her discretion have generally followed Schlesinger and converted the default termination to one for convenience.[217]

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[217] Darwin Constr. Co. v. United States, 811 F.2d 593, 596 (Fed. Cir. 1987); Quality Env't Sys. v. United States, 7 Cl. Ct. 428, 432 (1985) (holding that the remedy for abuse of discretion in terminating for default was "to convert the termination to one for the convenience of the government"); see S&W Assocs., DOTBCA No. 2633, May 6, 1996, 96-2 BCA ¶ 28,236, at 141,454 (explaining that an arbitrary and capricious termination "will be converted to one for the convenience of the Government").

B. Rejection of Termination for Convenience Damages Where the Government Improperly Terminated for Default

Normal termination for convenience entitles the terminated party to recover costs on work performed, plus a reasonable profit, plus other costs related to the termination for convenience. The courts and boards of contract appeals, however, have sometimes refused to award all termination for convenience costs where the contractor was in technical default and contributed to its termination.[218] These courts and boards have fashioned damages after common law or equitable principles outside the terms of the contract.[219] Consequently, the remedies vary according the facts and equities of each particular case.

In Dynelectron Corp. v. United States the Court found that the Air Force had improperly terminated for default a contract for jamming antennas where defective design specifications and impossibility of performance caused the contractor's failure to perform. However, the Court also found that the contractor contributed to some of the contract problems by failing to provide notice or request a change order. The Court of Claims stated:

> [W]e do not think plaintiff is entitled to shift all of its losses to the Government. In view of the share plaintiff's fault played in bringing the situation about, and its repeated failure to point out the Government's errors, which if done, might have enabled the Government to minimize its own losses as well as plaintiff's, we

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[218] Dynelectron Corp. v. United States, 518 F.2d 594, 603 (Ct. Cl. 1975); A.J.C.A. Constr. v. General Servs. Admin., GSBCA Nos. 11541, 11557, May 17, 1994, 94-2 BCA ¶ 26,949 (refusing to award termination for convenience costs where the contractor did not respond promptly to Government requests and failed to communicate with the Government when it left the jobsite).

[219] See Clay Bernard Sys. Int'l, Ltd. v. United States, 22 Cl. Ct. 804, 811 (1991).

> do not think it would be equitable to shift all the costs to the defendant, as in the normal convenience termination.[220]

The Court noted that under the literal terms of the default clause, the default is only converted to one for convenience if "the failure to perform the contract is due to causes beyond the control and without the fault or negligence of the contractor." The Court reasoned that "[s]ince the contractor was not without fault or negligence, it cannot have a settlement by the convenience termination formula. So much is clear."[221] The Court rejected the traditional termination for convenience damages and applied a measure of damages "provided by common law or equitable principles."[222] It suggested, however, that termination for convenience damages would serve as a cap for the contractor's recovery. It concluded that under the facts of that case, "the parties are to share equally the allowable and reasonable costs normally recoverable by plaintiff in a convenience termination."[223]

In A.J.C.A. Construction v. General Services Administration the Board found that the Government had not exercised its discretion in terminating the contractor default where it issued the show cause notice before it concluded negotiations on a modification affecting work on the critical path.[224] The Board also found that the contractor's behavior, including its failure to promptly respond to the Government's request for modification or show

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[220] Dynelectron, 518 F.2d at 603.

[221] Id. at 604.

[222] Id.

[223] Id. at 605.

[224] GSBCA Nos. 11541, 11557, May 17, 1994, 94-2 BCA ¶ 26,949.

cause letters, contributed to the situation leading to default. The Board recognized that the normal remedy was to automatically convert the improper default termination to a termination for convenience. It held, however, that "it would be inequitable to shift any termination-for-convenience costs to [the Government]."[225] Because the Government had already paid the contractor for the work it performed, the Board converted the termination for default into a no-cost termination for convenience.

Boards finding that both parties are responsible for the termination for default need not void the termination for default to apportion liability. In Big Star Testing Co. the board found that the Government had breached its duty to help minimize the impact of the contractor's justified inability to obtain certification of its hydrostatic testing facility. Despite the Government's breach, the Board found that the contract was properly terminated for default because the contractor never delivered a single serviced cylinder to the Government.[226] It did not find that the need to use a different facility rendered the contract commercially senseless or impossible.[227] Although the Board let the default termination stand, it refused to assess excess reprocurement costs against the contractor because "the Government bore some liability" for the unavailability of anyone to certify hydrostatic testing equipment.[228]

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[225] Id. at 134,205.

[226] Big Star Testing Co., GSBCA No. 5793, Sep. 17, 1981, 81-2 BCA ¶ 15,335, at 75,937.

[227] Id. at 75,940.

[228] Big Star Testing Co., GSBCA No. 5793-R, Jan. 21, 1982, 82-1 BCA ¶ 15,635, at 77,235.

The refusal of courts and boards to impose termination for convenience costs even where the Government's default is clearly improper shows the great power courts and boards have to exercise their equitable powers. They consciously exercise this power even when it conflicts with express contract terms. For example, the Board in Insul-Glass, Inc. recognized its power "to fashion a remedy which apportions costs fairly" even though this equitable power was contrary to the contract provision stating that an improper termination for default would be converted to one for convenience.[229] These cases are strong precedent for the argument that the Government's abuse of discretion does not require a court or board to convert the termination for default to one for convenience. Like a contracting officer considering whether to terminate for default or take some other action, courts and boards faced with the Government's improper termination for default have other options than to convert the default into a standard termination for convenience.

C. Whether a Termination for Default May Stand Where a Contracting Officer Failed to Exercise Discretion.

The Court in McDonnell Douglas recognized an issue not addressed by prior case law, "whether there would ever be a sufficient reason in light of the Government's failure to exercise discretion for which the contractor should withstand the harsh result of a default termination, especially where the reason is given first during litigation."[230] The McDonnell Douglas Court

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[229] Insul-Glass, Inc., GSBCA No. 8223, Oct. 25, 1988, 89-1 BCA ¶ 21,361, at 107,675.

[230] McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358, 375 (1996).

stated that if a default was egregious enough, it should be allowed to stand despite the contracting officer's abuse of discretion.[231]

In McDonnell Douglas, the termination notice stated the reasons for default were the contractors' "inability to complete the design, development, . . . and test of the A-12 aircraft within schedule and . . . inability to deliver an aircraft that meets contract requirements."[232] Although the contractors missed the first flight date in June 1990, the Navy did not terminate them for default.[233] It unilaterally established a new date for December 31, 1991. The Court also recognized that the Government believed the contractors were in default because everyone, including the contractors, agreed that the plane would exceed the maximum weight that the contractors had agreed to in their best and final offer (BAFO).[234] The Court, however, characterized these problems as "no more than a technical or bare default" because the Navy determined that the plane would still meet operational requirements.[235] The Navy allowed the contractors to perform for over a year after it first concluded that they would exceed BAFO weight without terminating them for default.[236] Under these facts, the court did not find that the default at issue was egregious enough for termination for default to stand.

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[231] 35 Fed. Cl. at 376.

[232] Id. at 368.

[233] Id. at 362.

[234] Id. at 376.

[235] Id. at 376.

[236] The Court concluded that, in 1989, the Contracting Officer believed that the plane would not be within the BAFO weight. By "January 1990, the Navy estimated that the aircraft in the first production lot would weight 7930 pounds over BAFO." Id. at 362.

CHAPTER VI.

DEGREE OF DEFAULT

A. **In General:** The degree of the contractor's default is an important factor which courts or boards may consider when determining whether the Government abused its discretion and when deciding the proper remedy after they find that the Government failed to exercised its discretion.

Courts and boards, however, have not universally considered the degree of default in the same way. As discussed in Chapter IV.B.3, several boards of contract appeals and courts already consider the degree of default in determining whether the contracting officer's failure to consider FAR 49.402-3(f) factors prejudices the contractor. Other courts and boards, however, have found that they do not need to consider the contractor's default in determining whether the Government abused its discretion.[237] Although the McDonnell Douglas court refused to consider the contractor's default in ruling that the Government abused its discretion, it considered the degree of default in determining the appropriate remedy for the Government's improper default. This consideration of the degree of default after the court determined that the Government's default was improper has precedence in prior case law, including cases involving fraud[238] and those where courts

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[237] McDonnell Douglas Corp. v. United States, No. 91-1204C, Sep. 14, 1995 Order; Walsky Constr. Co., ASBCA No. 41541, Feb. 9, 1994, 94-2 BCA ¶ 26,698, at 132,784.

[238] See, e.g., Joseph Morton Co. v. United States, 757 F.2d 1274, 1279 (Fed. Cir. 1985).

exercised their equitable powers to deny full relief under the Termination for Convenience clause to contractors who shared responsibility in the default.[239]

B. **Termination Based on Fraud or Illegality**: Several cases have sustained termination for default based on fraud or illegality, even though the contracting officer did not cite that ground in his or her termination notice and may not have even known of the conduct at the time of termination.[240] One court suggested that fraud or illegality warrants termination for default as a matter of law.[241] Although none of the cases upholding defaults on other reasons involve a lack of discretion, they suggest that some defaults may be so serious that they should be upheld even if the contracting officer failed to exercise discretion.[242]

C. **"Bare" or "Technical Default**

The language the Court used throughout the Schlesinger opinion suggests that the degree of default is relevant. In Schlesinger the contractor was required to deliver 15,000 caps by June 30, 1955. The contracting

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[239] See cases discussed supra in Chapter V.B.

[240] See Joseph Morton, 757 F.2d at 1279 (holding fraud committed by contractor warranted termination for default, even though discovered after termination); Kelso v. Kirk Brothers Mechanical Contractors, Inc., 16 F.3d 1173, 1176-77 (Fed. Cir. 1994) (sustaining a termination for default decision based on breach of Davis-Bacon and Copeland Anti-Kickback requirements, a ground not relied upon by the CO in the original termination); Brown v. United States, 524 F.2d 693, 705 (Ct. Cl. 1975).

[241] Joseph Morton, 757 F.2d at 1279 (dicta) ("there is support for the argument that any fraud warrants termination for default as a matter of law").

[242] See McDonnell Douglas Corp. v. United States, No. 91-1204C, January 31, 1995 Order.

officer waived plaintiff's default in not meeting the initial delivery date.[243] Additionally, although the Board made no finding on this point, evidence at trial suggested the contractor could have finished the caps in about 10 days.[244] The contracting officer later determined there was no urgent need for the caps.[245] The Court held that "the default article does not require the Government to terminate on finding a bare default but merely gives the procuring agency discretion to do so. . . . We are certain that there have been a great many instances in which the Government has not terminated a contractor in technical default, but has granted an extension or waived the noncompliance." The Court recognized that the Board found "plaintiff was at least in technical default when his contract was terminated."[246] The Court upheld the Board's finding of "the bare existence of the default." Its use of qualifying terms to characterize the default suggests that the extent of the default was critical to the ruling. The contractor's default did not prejudice the Navy because it did not need the items urgently.

In McDonnell Douglas, the Court recognized that the Schlesinger court's use of the words "technical' and bare" "to describe default in the circumstances of that case is important and appropriate." The McDonnell Douglas court also noted that "[t]echnical means 'marked by a strict legal interpretation,'[247] or 'concerned with or making use of technicalities or minute,

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[243] Schlesinger, 390 F.2d at 704.

[244] Id. at 705, n. 2.

[245] Id. at 705.

[246] Id. at 707-08 (emphasis added).

[247] McDonnell Douglas, 35 Fed. Cl. at 375, n. 27 (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 1196 (1977)).

formal points.'"[248] . . . Bare means 'without embellishment; unadorned; simple; plain' or 'no more than; mere.'"[249] In a May 19, 1995 order, the Court recognized, "[a] reference to bare or technical default in that case implies that something more than a bare technical default could create a different result."[250]

In addition to using qualifying language to describe default, the Court in Schlesinger revealed its belief that the degree of default mattered when it discussed whether the contracting officer would have considered an extension if the Navy had not abused its discretion. In footnote 7, the Court stated:

> There is no need to decide whether an extension after June 30th would actually have been granted if the Navy had not needlessly abjured its discretionary function upon receiving the Congressional letter. The record contains enough evidence to show that doubtless an extension would at least have been considered, i.e., that discretion would have been invoked.[251]

By considering the way in which the Government would have behaved had it exercised discretion, the Court implicitly considered whether the contractor was prejudiced by the lack of discretion.

In Darwin the Court noted that Darwin could have completed the unfinished work "much sooner than a successor contractor could have

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[248] Id. (citing WEBSTER'S NEW WORLD DICTIONARY 1373 (3d ed. 1988)).

[249] Id. (citing WEBSTER'S NEW WORLD DICTIONARY 110).

[250] McDonnell Douglas Corp. v. United States, No. 91-1204C, May 19, 1995 Order.

[251] Schlesinger, 390 F.2d at 707, 708, n. 7.

performed . . . ."[252] This language suggests that the Court considered the extent of the default and the prejudice to the contractor before concluding that the Government had abused its discretion.

Because case law prior to McDonnell Douglas does not specifically discuss the role of the degree of default, it is often difficult to judge from the cases what facts support the proposition that degree of default is important and which support the finding that the contracting officer's stated reasons are pretextual.

D. **Egregious Default**

In McDonnell Douglas Corp. the Court followed the logical implications of cases suggesting that the degree of default is relevant and stated that:

> The extent of the default may affect a contracting officer's decision whether to continue the contract. The greater and more extensive the problems, the less likely it is that a contracting officer would choose to continue the contract. In such circumstances, a termination for default is more likely. The FAR factors might provide reason to continue the contract or take other action. But that decision is one for the contracting officer and the agency to make.
>
> At some point, default could be so extraordinary or egregious that the Government would have no choice but to terminate. Application of discretion would be superfluous because any rational contracting officer would be compelled to terminate for default. At this extreme, any other decision by the contracting officer could be an abuse of discretion. Thus, a termination imposed without the benefit of reasoned discretion could be upheld only if contractor performance were so deficient that termination for default was the only possible result.[253]

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[252] 811 F.2d at 598-99.

[253] McDonnell Douglas, 35 Fed. Cl. 376; see also McDonnell Douglas Corp. v. United States, No. 91-1204C, January 31, 1995 Order.

1. **Nature of Egregious Default**

Because the Court ultimately found that McDonnell Douglas was in "no more than a technical or bare default, if that," it is not clear under what circumstances a court will consider a contractor's default to be egregious. As McDonnell Douglas is the first case to articulate the concept of egregious default, it is useful to examine the meaning of this concept as developed in the Courts many rulings. In an early order, Judge Hodges states, "[I]n the event of egregious default, termination for default would be the result irrespective of whether the decision-maker abandoned his duty of reasoned consideration. In such case, exercise of discretion becomes superfluous, and conversion to convenience termination could be unconscionable."[254] In another order, the judge further explained that for the Government to prove egregious default, it must show that "plaintiffs' performance under the contract was so seriously deficient that conversion to convenience termination would create an unconscionable windfall for the contractors; that plaintiffs' performance was hopelessly inept."[255]

Some of the orders appear to be inconsistent. In the January 31, 1995 order, the Court noted that in an egregious default, "proper exercise of discretion by a decision-maker could only have resulted in a termination for default."[256] However, in a May 19, 1996 order, Judge Hodges stated:

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[254] McDonnell Douglas, January 31, 1995 Order (emphasis added).

[255] McDonnell Douglas Corp. v. United States, No. 91-1204C, March 15, 1995 Order. In a December 1, 1995 transcript, the court also stated that egregious default would exist if the plaintiffs "were so hopelessly in default that . . . it would be miscarriage of justice to give them anything." Defendant's Motion to Reaffirm Scope of Trial, Dec. 6, 1995, at 4, McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358 (1996) (quoting 12/1/95 Transcript).

[256] January 31, 1995, Order; Defendant's Brief, Aug. 16, 1995, McDonnell Douglas v. United States, 35 Fed. Cl. 358 (1996) (No. 91-1204C).

> [w]e do not intend to place this court in the position of contracting officer. We will not make the contracting officer's decision for him in retrospect or otherwise. . . . It does not matter whether a contracting officer exercising proper discretion might have reached the same result. Defendant must show that plaintiffs were so egregiously in default that to impose a termination for convenience would create an unconscionable windfall for plaintiffs such that a court of law could not be a party to the result.

The most troubling aspect of the "egregious default" standard is the concept that in certain instances, a termination for convenience may be an unconscionable result which a court could not be a party to.

While courts are very willing to find that cases warrant termination as a matter of law, the regulations and existing law never **require** the contracting officer to terminate as a matter of law.[257] Even if a company is involved in criminal fraud and becomes debarred from contracting with the Government, the contracting officer may continue an existing contract, unless the agency head or designee directs otherwise.[258]

2. Timing of Egregious Default Finding

The McDonnell Douglas court considered the issue of whether the default was egregious after it found that the contracting officer was deprived of discretion by actions of the Secretary of Defense. It did not specifically consider the extent of default in determining whether the contracting officer abused his discretion. However, evidence that the Navy did not believe the

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[257] See FAR 9.405-1(a); Integrated Sys. Group, Inc. v. Department of the Army, GSBCA No. 12613-P, 94-2 BCA ¶ 26,618, at 132,422; SRS Technologies v. United States, 843 F. Supp. 740, 744, n. 4 (D.D.C. 1994).

[258] FAR Part 9.

default was significant supported the Court's holding that the technical default was a pretext.

By allowing the Government to submit evidence of egregious default after it found that the contracting officer failed to exercise discretion, the Court recognized an exception to Schlesinger.[259] This exception is significant because it is the first time that a court has clearly articulated the principle that the contracting officer's discretion may be superfluous if the default is sufficiently egregious.

Boards already implicitly consider the degree of default in determining whether the Government's failure to consider a required FAR factor would affect the termination decision. The more significant the default, the less likely the contracting officer's procedural error would impact the contracting officer's decision. In a pretext case, however, the impetus for terminating the contractor is not its default, it is some other improper motive. Courts and boards have not yet applied the harmless error rule in such situations, although prior cases suggest that the issue of whether the contractor is prejudiced is relevant.[260]

Until the courts and boards explicitly extend the harmless error rule to pretext and motive cases, the egregious default exception is likely only to apply in pretext cases. If the contractor's conduct is egregious, any procedural error would be harmless and not sufficient to support a finding that the Contracting Officer abused his or her discretion.

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[259] See United States v. McDonnell Douglas Corp., 918 F. Supp. 1338 (E.D. Mo. 1996) (recognizing that the Federal Circuit had created a "novel 'egregious default' exception" to Schlesinger).

[260] See discussion in text, supra at IV.B.4 & .5.

Although the McDonnell Douglas opinion does not purport to overrule Schlesinger, the Court's application of the egregious default exception after the Court determined that the Government failed to exercise discretion indicates a departure from Schlesinger.

Schlesinger was based on the premise that because the termination was not a product of discretion, the termination for default was void and was not effective to end performance on the ground of default. Therefore, Schlesinger found that the Government's improper cancellation caused the termination to be treated under the termination for convenience clause in the contract. Under such a rationale, once a court finds abuse of discretion, the court's inquiry ends. The contract terms dictate a termination for convenience. The McDonnell Douglas' court's inquiry into whether default was egregious creates an exception under Schlesinger. One may view the Court's analysis as deriving from one of three theories: (1) the Court recognized its right to refuse to enforce the contract provision requiring conversion to a termination to convenience if conversion creates an unconscionable result; (2) it rejected the underlying rationale of Schlesinger that the lack of discretion nullified the termination for default notice; or (3) by allowing evidence of egregious default, it was merely recognizing the harmless error rule previously recognized by courts and boards.

The best interpretation of the Court's ruling is a combination of the first and second rationale. Because the Court heavily relies on Schlesinger to justify its analysis throughout the opinion, it clearly did not intend to suggest a different rationale for converting a termination for default to one for convenience in the majority of cases where the Contracting Officer failed to exercise discretion. However, the Court's ruling in McDonnell Douglas limits the application of Schlesinger and clauses requiring an improper termination

for default to be converted into one for convenience in circumstances where the result would be unconscionable. If the termination notice did not validly end performance based on default, McDonnell Douglas suggests that the Court can nevertheless uphold the termination for default because any other result would be unconscionable. In effect, this standard limits the holding in Schlesinger that the CO must exercise discretion.

Courts and boards have long recognized that they have a right to limit the application of a contract clause to avoid an unconscionable result. In doing so, they have frequently used Uniform Commercial Code, ¶ 2-302 as a guide.[261] U.C.C. § 2-302(1) provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result (emphasis added).

Although the Court in McDonnell Douglas did not specifically reference U.C.C. § 2-302(1), the Court's opinion and its orders borrow many terms from this clause. This similarity in language suggests the Court used a similar rationale in recognizing that it would not convert a termination for default to one for convenience of it created an unconscionable result.

In addition to a court's ability to refuse to enforce an unconscionable contract clause, it has the power to refuse to enforce unconscionable results.

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[261] See Service Eng'g Co., ASBCA No. 40272, May 22, 1992, 92-3 BCA ¶ 25,106, at 125,188; United Serv. Corp., ASBCA No. 25786, July 28, 1982, 82-2 BCA ¶ 15,985, at 79,270; cf. Poling v. Capital Systems, Inc., 856 F.2d 187, 1988 WL 86607 (4th Cir. 1988) (unpublished decision) (stating "this court does not have to construe laws and principles so as to produce unconscionable results").

This is especially true where Schlesinger created the judicial sanction for failure to exercise discretion. A court could limit the sanction of converting the termination for default to one for convenience if this sanction created an unconscionable result.[262]

The fact that the McDonnell Douglas court applied the egregious default exception after it found lack of discretion suggests it did not consider degree of default in the same context that the boards have in using the harmless error exception. Despite this, one could read the Court's opinion as discussing the harmless error exception. In footnote 29, it quoted from the Government's argument as follows:

> At a hearing, the Government pleaded that 'if the default was, as we believe occurred here, egregious and overwhelming, then the . . . violation could not have any impact on the decision to terminate for default. In other words, if the default is so overwhelming, it's a harmless error problem because no reasonable contracting officer could have decided to ignore that default.' The term 'egregious' connotes a harshness appropriate in the circumstances of this case. Indeed, only the most outrageous and flagrant of defaults could absolve the government of its wrongful termination.[263]

The Court does not contest the Government's harmless error argument and appears to be expanding on it when it discusses the meaning of "egregious."

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[262] Cf. Huntt v. Government of the Virgin Islands, 382 F.2d 38, 44 (3d Cir. 1966) (dicta) (noting "only the most compelling reasons and the clear necessity to avoid the most unconscionable results could, if at all, sustain the substitution by the court of its judgment for that which is committed to the discretion of the legislative organ"); Glopak Corp. v. United States, 12 Cl. Ct. 96 (1987).

[263] McDonnell Douglas, 35 Fed. Cl. at 376, n. 29.

3. **Whether the Egregious Default Exception Represents a Substitution of the Court's Judgment for that of the Contracting Officer**: In McDonnell Douglas, the plaintiffs argued that substitution of the Court's judgment for the contracting officer's discretion would "violate the constitutionally mandated separation of powers between the judicial and executive branches of government." Additionally, they argued that the Court lacks such authority to make the findings and determination required by FAR 49.402-3(f). However, in other instances, the Court has been able to find that the facts and circumstances indicate that the officials decision was the only rational choice and that the decision was not an abuse of discretion. The key question should be whether failure to exercise any discretion automatically is an abuse of discretion, no matter how severe the default. Generally, judges do rule based on what the contracting officer, as a reasonable contracting officer, should have done.[264] While a court could not render a discretionary decision that the regulations required the contracting officer to make, it could certainly find that a procedural defect was harmless error.[265] Additionally, it may use its broad equitable powers to fashion a remedy that considers the contractor's role in the default.[266]

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[264] Curran v. Laird, 420 F.2d 122, 129 (D.C. Cir. 1969).

[265] Cf. Samuel T. Isaac & Assoc. v. United States, 5 Cl. Ct. 490, 493 (1984) (finding "where a contract or regulation provides that a designated official or government agency is to exercise discretion with respect to whether a particular default warrants termination of a contract, the contractor is entitled to an exercise of judgment by that designee and that judgment may not be pre-empted by the court or by the Department of Justice"); New York Shipbuilding Corp. v. United States, 385 F.2d 427, 435-37 (Ct. Cl. 1967).

[266] Dynelectron Corp. v. United States, 518 F.2d 594, 603 (Ct. Cl. 1975).

4. **Effect of Egregious Default Exception on the Government's Ability to Convert a Termination for Convenience to One for Default**

If a default is so egregious that a court could not accept a termination for convenience, it raises the issue of the continued validity of long-standing case law that if the contracting officer decides to terminate for convenience, rather than for default, the Government may not change the convenience termination to one for default even if the Government could have terminated for default.[267] By analogy, if the court could not countenance a termination for convenience where the contracting officer had failed to exercise discretion, how could it countenance the same termination where the contracting officer abused his or her discretion and terminated for convenience?

A sufficient distinction, however, exists between the two circumstances that a court could, in one case, uphold a termination for default not based on discretion and, in another case, continue to refuse to allow an agency to convert a termination for convenience into one for default. The cases addressing the Government's request to convert a method of termination stress that while government contracts provide for a termination for either convenience or default, they do not "grant a right to unilaterally change an effective convenience termination to a termination for default."[268] By contrast, in abuse of discretion cases, the contracting officer has already terminated for default. The issue is whether to let the default stand.

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[267] Cecile Indus., Inc., ASBCA No. 24600, Apr. 30, 1981, 81-1 BCA ¶ 15,122, at 74,814; Roged Inc., ASBCA No. 20702, July 20, 1976, 76-2 BCA ¶ 12,018, at 57,653.

[268] Cecile Indus., Inc., supra note 256.

CHAPTER VII.

CONCLUSION

At a minimum, the Government must exercise sufficient discretion before terminating a contract for default so that the contract is not illusory. The degree of the contractor's default is very relevant in determining whether the termination was in accordance with the bargain. If the Government terminated in bad faith for the smallest breach, this suggests the bargain was illusory. If the contractor's default is significant, however, the bargain is preserved and the courts have discretion both in deciding whether the Government exercised its discretion and the appropriate remedy.

The degree of default is relevant to both considerations. If the contractor's default is significant, courts and boards may find that the Government properly exercised discretion even where it failed to consider several relevant factors.

Additionally, if a board or a court finds that the Government abused its discretion, it may consider the extent of the contractor's default in determining whether to allow the default to stand or to convert the default into a termination for convenience. Most courts have interpreted the default clause to provide for the conversion of the termination for default into a termination for convenience where the Government abused its discretion. Courts and boards, however, are not bound to uphold the strict terms of the contract where the results are unconscionable. Despite their great equitable powers to reject an unconscionable result, they are extremely reluctant to overturn the terms of a contract. Consequently, no court or board finding that the Government failed to exercise discretion has ever refused to convert the termination to one for convenience because the default was egregious. Several cases finding that a default was improper, however, have relied on

their equitable powers and have refused to grant the contractor full termination for convenience damages where the contractor significantly contributed to the Government's actions.